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Ontario
Labour Relations
Board

REPORT

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Decisions

August 82

Publications



ONTARIO LABOUR RELATIONS BOARD

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**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [1982] OLRB REP. AUGUST

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0780-82-U Mechanical Contractors Association Ontario, Applicant, and United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 463, **All-Pro Contractors**, Chris Burrows, Peter Christy, Regional Mechanical Services, and 375253 Ontario Limited, Respondents

Construction Industry – Related Employer – Strike – Unfair Labour Practice – Prior Board order finding supply of members during province-wide strike in breach of section 146(2) – Whether respondent related employer bound by Board’s cease and desist order – Board interpreting section 146(2) as prohibiting arrangements with any employer to perform struck work

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members W. Gibson and Stewart Cooke.

APPEARANCES: *G. Grossman for the applicant; H. M. Pollit and Chris Burrows for respondents Local 463 and Chris Burrows; Charles C. Mark, Q.C. and James W. Spence for respondents Peter Christy, Regional Mechanical Services and 375253 Ontario Limited.*

DECISION OF THE BOARD; August 5, 1982

1. The name of the respondent Peter Christie is amended to read “Peter Christy”.
2. This is an application for a direction under section 135 of the *Labour Relations Act*, alleging that the respondents have acted in violation of the prior order of the Board issued in File No. 0528-82-U, and as well, seeking relief for independent violations of sections 146(2) and 148(1) of the Act. The applicant, alternatively, seeks relief under section 89 of the Act.
3. The Board order referred to in these proceedings arose out of an application under section 135 of the Act filed on June 16, 1982, alleging that the respondent trade union and its Business Manager, Chris Burrows, were supplying men to one of their unionized contractors, “All-Pro”, to perform construction work in the industrial, commercial and institutional sector of the construction industry at the Cadbury Schweppes plant in Whitby during the period of a province-wide strike. The application was heard on June 22, 1982, and on June 28th the Board, by telegram, issued the following decision and order:

RE SECTION 148(1) FILE 0528-82-U DECISION BETWEEN MECHANICAL CONTRACTORS ASSOCIATION ONTARIO AND UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 463, ALL-PRO CONTRACTORS AND CHRIS BURROWS STOP
HAVING HEARD THE EVIDENCE AND CONSIDERED THE SUBMISSIONS OF THE PARTIES THE BOARD FINDS THAT:

1. MECHANICAL CONTRACTORS ASSOCIATION OF ONTARIO (MCAO) IS A DESIGNATED EMPLOYER BARGAINING AGENT AND IS ENGAGED IN NEGOTIATIONS FOR THE RENEWAL OF THE PROVINCE

WIDE COLLECTIVE AGREEMENT COVERING PLUMBING
AND RELATED WORK IN THE ICI SECTOR STOP

2. THE RESPONDENT UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA LOCAL 463 IS AN AFFILIATED BARGAINING AGENT AND IS BOUND BY THE TERMS OF THE DESIGNATION ISSUED TO THE EMPLOYEE BARGAINING AGENCY STOP
3. THE RESPONDENT ALL-PRO CONTRACTORS IS BOUND BY THE TERMS OF THE DESIGNATION ISSUED TO MCAO STOP
4. A PROVINCE WIDE STRIKE COMMENCED ON MAY 25, 1982 STOP
5. SUBSEQUENT TO THE COMMENCEMENT OF THE STRIKE AND CONTINUING LOCAL 463 HAS SUPPLIED ALL-PRO CONTRACTORS WITH MEN TO PERFORM WORK AT THE CADBURY SCHWEPPE'S PLANT IN WHITBY WITHIN THE ICI SECTOR OF THE CONSTRUCTION INDUSTRY STOP

IN SO FAR AS THE 'MAINTENANCE AGREEMENT' ENTERED INTO BETWEEN LOCAL 463 AND ALL-PRO ON MAY 28, 1982 PURPORTS TO COVER THE WORK BEING DONE BY THE RESPONDENTS AT THE CADBURY PLANT IT IS IN VIOLATION OF SECTION 146(2) OF THE ACT STOP

THE ASSIGNMENT OF ITS MEMBERS TO PERFORM THIS ICI WORK AT THE CADBURY SCHWEPPE'S PLANT IS IN VIOLATION OF SECTION 148(1) OF THE ACT AND ACCORDINGLY LOCAL 463 AND ITS OFFICIALS AND AGENTS ARE DIRECTED TO CEASE AND DESIST FROM ASSIGNING LOCAL 463 MEMBERS TO PERFORM THIS WORK DURING THE CURRENCY OF THE PROVINCE WIDE STRIKE WHICH IS PRESENTLY IN PROGRESS STOP

4. The present application alleges that the respondent trade union has continued to supply men on the Cadbury Schweppes job to a "related employer", Regional Mechanical Services ("Regional") in violation of the Board's original order and the Act. Regional is a company formed by the previous job superintendent for All-Pro at Cadbury Schweppes, the respondent Peter Chrysty. All of the employees whom Mr. Christy hired to carry on the pipefitting work at Cadbury Schweppes were members of the respondent Local 463 who had, until the date of the Board's prior decision, been employed by All-Pro, under Mr. Christy's supervision, on that very job.

5. Cadbury Schweppes appeared at the hearing of this application seeking to intervene. It explained to the Board that the pipefitting work in question was part of an urgent project which, if prevented from being completed at this time, would necessitate a subsequent shutdown period involving substantial loss of production and employment. The Board ruled that the present situation was not sufficiently distinct from the situation before the Board and the Divisional Court in *Napev Construction Limited*, [1976] OLRB Rep. March 109; affirmed by the Divisional Court, Supreme Court of Ontario, May 24, 1977, to cause the Board to depart from the principles considered in that case. The Board ruled that Cadbury Schweppes had a “commercial interest” in the present application not sufficiently direct, in accordance with the *Napev* principles, to cause the Board to add Cadbury Schweppes as a party. In the exercise of its discretion, the Board noted as well, in accordance with the comments of the Supreme Court in *Starr v. Town of Puslinch*, (1976), 12 O.R. (2d) 40, that Cadbury Schweppes’ interests were adequately represented by those of the respondents Peter Christy, All-Pro and Regional, who were contesting the present application. Counsel for Cadbury Schweppes thereafter indicated that he was now appearing on behalf of the respondent Regional, and proceeded to call his witnesses through Regional to refute the “related employer” allegation.

6. Counsel for the respondents Local 463 and Chris Burrows objected to the Board’s jurisdiction to hear the application on the grounds that section 135 was inapplicable to a “failure-to-strike” situation such as the present. The Board indicated it would reserve on this issue and proceed to hear the evidence, particularly since no such objection had been raised on the hearing of the prior application in June, and no notice had been given that the matter would be raised at the hearing on the present occasion. Section 135(1) reads:

Where on the complaint of an interested person, trade union, council of trade unions or employers’ organization the Board is satisfied that a trade union or council of trade unions called or authorized or threatened to call or authorize an unlawful strike or that an officer, official or agent of a trade union or council of trade unions counselled or procured or supported or encouraged an unlawful strike or threatened an unlawful strike, or that employees engaged in or threatened to engage in an unlawful strike, it may direct what action if any a person, employee, employer, employers’ organization, trade union or council of trade unions and their officers, officials or agents shall do or refrain from doing with respect to the unlawful strike or the threat of an unlawful strike.

The Board does not consider it appropriate to deal with this issue in this case. The applicant claimed alternative relief under section 89 of the Act. Given the actions of Cadbury Schweppes and the respondents following receipt of the Board’s initial order, and the impression that was created of a “related employer” situation, the Board does not find the applicant’s second invocation of section 135 to be an abuse of process, and is prepared to consider the applicant’s claim for relief in any event under section 89.

7. The respondents raised a second preliminary objection, on the ground that the applicant was seeking a “non-compliance” order (indeed, that in broad terms is the way the application was framed), and that the only jurisdiction to enforce compliance with a Board order lay in the Courts. Quite apart from the applicant’s alternate argument of independent violations of the Act, however, the Board noted that the prior order, to the extent that the

present application depended upon it, named only All-Pro Contractors as a contractor against whom relief was granted. The present application sought relief against a new employer entity, Regional Mechanical Services, on the grounds that it was in law an "employer" related to All-Pro. The Board ruled that it did not seem inappropriate for the applicant to seek this "related-employer" declaration from the Board prior to moving in the Courts to enforce further compliance if necessary, particularly in view of the wording of section 1(4) itself, which provides:

Where, *in the opinion of the Board*, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

(emphasis added)

This preliminary objection was accordingly dismissed as well by the Board.

8. The evidence leaves no doubt that Cadbury Schweppes was desperate to ensure that its shutdown work be completed on schedule, and had begun to make "contingency" arrangements even before the plumbers strike began. When the strike did begin on May 25th, Mr. Clifford, Cadbury Schweppes' Manager of Project Engineering, asked Peter Christy if there was any way of getting All-Pro's men back on the job. The signing of a "maintenance" agreement with Local 463 was discussed, and Cadbury Schweppes subsequently wrote to the union with that suggestion, indicating it would even be prepared to pay retroactively for the work performed during the strike. The union was agreeable, and a maintenance agreement was signed by Peter Christy on behalf of All-Pro. The applicant MCAO, however, was of the view that this was not "maintenance" work being performed but rather "construction" work, and filed the aforementioned section 135 application with the Board. The Board agreed with the position of the MCAO, and on June 28th issued the cease-and-desist order recited earlier in this decision.

9. Mr. Christy was on vacation during the week that the Board decision issued and, according to his evidence, had already arranged with All-Pro to quit the company. He stated that his relations had not been good with Mr. Rose, All-Pro's owner, for several months preceding that, and that everyone at All-Pro knew that the job at Cadbury was the last that Mr. Christy was going to do for All-Pro. On the subject of what Mr. Christy was going to do after he left All-Pro, Mr. Christy says that there was a good deal of joking on the job site that he was going to form a company called "No-Name Contractors" and go back into business for himself. On July 1st, Mr. Clifford telephoned Mr. Christy at home and advised him of the Board's decision. Mr. Christy said that he guessed that that meant he could stay on vacation. Mr. Clifford asked him if he had been serious about going into business for himself, and whether he would like to take over the work of All-Pro on that basis. Mr. Christy indicated that he was agreeable to that, and it was agreed that he could finish All-Pro's work on the same terms and conditions as had applied to All-Pro. Mr. Christy pointed out that the company would have to be non-union, and Mr. Clifford agreed with that.

10. Mr. Christy then went about setting up his own company. He registered as a proprietorship under the name "Regional Mechanical Services" and arranged for an account at the Workmen's Compensation Board. He also arranged for the transfer of his Master's licence to his own company, and was advised that that would prevent All-Pro from carrying on any further mechanical contracting. Mr. Christy and his girlfriend are the only investors, officers and directors in Regional, and that company has no relationship or arrangement whatever with All-Pro Contractors. The company's head office is Little Britain, Ontario, and Mr. Christy's home, and the company has its own accountant and solicitor. Mr. Christy asked Bob Gay at Canada Manpower to send him candidates for employment to be interviewed at a hotel in Oshawa on July 7th. Mr. Christy stipulated the high qualifications which the work would require, and that the job would be non-union. Mr. Christy testified that Mr. Gay had trouble filling the order because of the high qualifications demanded, and of the 9 people sent by Mr. Gay, Mr. Christy hired 6. All 6 were Local 463 members who had been working under Mr. Christy at Cadbury up until the day of the Board's order. Mr. Christy's evidence indicates that subsequently two or three other All-Pro employees from the Cadbury site applied for employment, and were hired by Mr. Christy as well. Asked if he had had any discussion with either the trade union or these additional employees about applying for employment with him, Mr. Christy testified that he did not, and that it was unnecessary because the news of his job "spread like wildfire". One of the All-Pro employees hired by Mr. Christy to continue work at the Cadbury Schweppes plant was, incidentally, the son of Chris Burrows, Local 463's business manager. Mr. Burrows testified that his son has not lived with him for the past 6 or 7 years. In any event, the pipefitting work at Cadbury Schweppes continued through Peter Christy and Regional, and the other parts of All-Pro's contract at Cadbury Schweppes, covering electrical and millwrighting work at the plant, continued to be done by All-Pro's other union craftsmen. There was no evidence as to where the tools or equipment used by Regional came from. Regional does have other jobs pending now, all from Cadbury Schweppes.

11. The respondent Chris Burrows gave evidence as to his knowledge and activities of the above arrangements. His home address is also Little Britain, Ontario, the same as Mr. Christy, but he testified he rarely sees Mr. Christy on a social basis, and that he at no time discussed with Mr. Christy the formation or staffing of his new company. Notwithstanding as well the inclusion of one of his sons in the work crew, the presence of other union trades of All-Pro on the job, and the fact that the hiring efforts of Mr. Christy "spread like wildfire" to other members of Local 463, Mr. Burrows denies that he or any officer of Local 463 had any knowledge of his members working for Mr. Christy at Cadbury Schweppes until Friday, July 16th, when they read about it in the newspapers. He testified that he was himself tied up in province-wide negotiations in Toronto, but instructed the "acting" business agent Harry Duggan to investigate the situation on Monday morning. Mr. Duggan did so and reported to Mr. Burrows that he had identified three members of the Local working at Cadbury Schweppes before he was escorted off the job. Mr. Burrows instructed Mr. Duggan to write to the three members advising them that they would be charged under the union's constitution if they persisted in working for an employer who was not in contractual relations with Local 463 or any of its affiliated Locals. Mr. Duggan did so, and, not receiving any response from the men by July 21st, filed the charges. The Board was advised that the charges would be put before the membership at the next general meeting, which would take place after the strike, and that the charges would then normally be referred to the Executive Board for trial. The Board was also advised that the penalty in the event of a "conviction" was in the discretion of the Executive Board. Mr. Burrows was asked by counsel for the applicant why he did not

instruct the Cadbury Schweppes job to be picketed when he heard that a “non-union” contractor was performing the work, and Mr. Burrows responded that it was not Local 463’s policy to picket job sites. Upon further examination, Mr. Burrows acknowledged that he had recently set up an unlawful picket line (unconnected with the present negotiations) at a hospital job site when he learned that a union contractor had spun the pipefitting work off to a related non-union company.

12. On the basis of the above evidence, the “related employer” allegation can be dealt with succinctly. The applicant conceded that had Cadbury Schweppes replaced All-Pro with a truly independent non-union contractor, there would be no basis to complain. But there clearly is not the “essential unity and identity” in ownership and control of the two entities in this case to come within the definition of “related employer” under section 1(4) of the Act. See, e.g., *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945. There are no common directors, officers or shareholders between the two organizations, nor is there evidence of any form of commercial arrangement existing between the two. The situation, on this aspect of the case is closer to the kind of “spin-off” occurrence which the Board found to be neither a 1(4) relationship nor a “sale of a business” in *Rivard Mechanical*, [1981] OLRB Rep. May 550.

13. The question whether the respondents (excluding All-Pro) are violating the Act’s province-wide bargaining provisions themselves is far more complex. No case has been made out to establish that Local 463 or any of its affiliated Locals have bargaining rights for Regional, so that that company does not itself fall within the class of companies brought into province-wide bargaining by the employer bargaining agency designations. It is a case, if the applicant’s allegations are made out, of a building trades union supplying its members to work for a non-union company, no doubt a situation never expressly contemplated by anyone at the time this legislation was pieced together. While the activities and intentions of the owner, Cadbury Schweppes, are readily transparent, it does not follow from that alone that the method adopted to complete the work which Cadbury Schweppes urgently required to be done is unlawful, bearing in mind in particular that Cadbury Schweppes is itself an innocent third party to the strike which has created the problem.

14. In seeking to establish that the present arrangement is unlawful, the applicant again relies on sections 146(2) and 148(1) of the Act. Section 148(1) reads:

Where an employee bargaining agency desires to call or authorize a lawful strike, all of the affiliated bargaining agents it represents shall call or authorize the strike in respect of all the employees represented by all affiliated bargaining agents affected thereby in the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e), and no affiliated bargaining agent shall call or authorize a strike of such employees except in accordance with this subsection.

It cannot be that that section requires Local 463 to call a strike of its members against Regional Mechanical Services in accordance with the province-wide strike, because Local 463 has no bargaining right for employees of Regional, and the conciliation requirements of the Act have not been met. It would, in other words, be an *unlawful* strike with respect to Regional Mechanical Services and its employees, by virtue of the other provisions of the *Labour Relations Act*.

15. But this anomaly does not arise if section 146(2), the broader of the two sections, operates to prevent Local 463 from supplying its striking members to Regional in the first place. Section 146 provides:

146.-(1) An employee bargaining agency and an employer bargaining agency shall make only one provincial agreement for each provincial unit that it represents.

(2) On and after the 30th day of April, 1978 and subject to sections 139 and 145, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting *employees represented by affiliated bargaining agents* other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void.

(3) Every provincial agreement shall provide for the expiry of the agreement on the 30th day of April calculated biennially from the 30th day of April, 1978.

(emphasis added)

Can a bargaining agent be said to "represent employees" at a time when the individuals in question are working for a *non-union contractor*, i.e., a contractor for whom the trade union holds no bargaining rights?

16. As can be seen, the concern of the Legislature in section 146(1) is to protect the principle of a *single* province-wide collective agreement. But if that was the Legislature's only concern, it could have stopped there; subsection (1) is plain enough. Instead, the Legislature went on to proscribe in subsection (2) a host of activities which those with a knowledge of the process recognized would be inimical, if not fatal, to the intended operation and product of province-wide bargaining. As the Board commented in *Sikora Mechanical Ltd., et al.* [1982] OLRB Rep. June 941, at paragraph 18:

. . . we agree with the earlier holding of this Board in *Jen-Mar* at paragraph 17 that province-wide bargaining represents a far more complicated system of bargaining when compared to bargaining under a certificate of accreditation and that, in this context, the more general wording of section 146(2) constitutes a more comprehensive regulation of that process than was envisaged with respect to accreditation. In other words, given the importance of province-wide bargaining and the need for uniformity in the bargaining process, the use of more general language in section 146(2) could only have been intended to provide the Board with a much broader mandate in dealing with all manner of activity that impairs the integrity of province-wide bargaining.

It is also apparent that the legislators, in dealing with the uniquely complex and sensitive process of province-wide bargaining, recognized that it could never hope to anticipate the full range of creativity with which the labour relations community would respond to the legislation, and thus employed language which is striking by its breadth. It is left to the knowledge and experience of the Ontario Labour Relations Board to give that language a meaning which will be true to the goals of the legislators. As the Board put it, again in *Sikora Mechanical Ltd.*, *supra*, at paragraph 20:

. . . Moreover, to guard against the inventiveness of particular parties, general statutory language was used to give the Board a broad mandate to regulate this very important economic process.

17. It is well established that the supply of Union members to continue to work in the face of a province-wide strike can fall within the range of "other arrangements" prohibited by section 146(2). See *Jen Mar Construction Limited*, [1978] OLRB Rep. July 647; *Sikora Mechanical*, *supra*. Nor can there be any doubt that the order issued by the Board in connection with the present job in Board File No. 0528-82-U was precisely the kind of order contemplated by the section. This being the case, does it make sense that the impact of that order could be avoided for *one side only* (i.e., the affiliated bargaining agent and its members) in every case simply by creating a new "non-union" entity to employ the very members of the striking union on the very work which supposedly is being "struck"? Or, as Mr. Grossman argues, does it make sense that the affiliated bargaining agent and its members could avoid the impact of the order simply by offering their services directly to the owner-customer? To extend Mr. Grossman's argument, if the response of the parties is acceptable in this case, what is to prevent a re-enactment of it on virtually every ICI job in the province, at least where there is a customer for whom an affiliated bargaining agent does not hold bargaining rights? We know that the legislation prohibits the unionized *contractor* from continuing to employ union members during a strike. Is the Union then free, after ushering the contractor off the job by the calling of its strike, to offer to provide its same members to the customer for the purpose of continuing the struck work? Can the Legislature have intended to distort to such an extent the relative strengths of the parties in a legislated bargaining process that, needless to say, must have been intended to be workable?

18. This province-wide bargaining legislation, for the reasons given, may well stand on its own footing. Yet it is interesting to note the recognition which has been given in other contexts to the effect of hiring-hall and closed-shop provisions in the collective bargaining arrangements of industries like this one on ordinary notions of master-and-servant relationships; and further, the basis on which a trade union in that context can be said to "represent employees" who are at a given point in time not employed by a specific employer at all. In the *International Longshoremen's Association* case, (1978), 89 D.L.R. (3d) 289, the Supreme Court of Canada had to consider the question whether members of the Longshoremen's Union could be said to be engaging in a strike at a time when they had not yet been referred to work. The Court commented, commencing at page 293:

. . . When these collective agreements were signed by the officers of the Association and the officers of the Locals, all the parties to the agreements recognized the peculiar or particular characteristics of the stevedoring business in the Port of Saint John; the local for its part undertook to supply the required labour, and the Association, on behalf

of its member employers, undertook to assign stevedoring work only to members of the Locals. The agreements in their entirety are predicated upon this relationship and on the fact that labour would be required only when work was available to be performed and that hence the remuneration would be paid to members of the Locals only when services are requisitioned by the Association members pursuant to the terms of the collective agreements. For the purposes of collective bargaining and labour relationships under the resulting collective agreements, members of the Association and members of the Locals were respectively employers and employees from the onset of the agreements, whatever their rights and obligations may or may not include under the common law of master and servant.

and at page 294:

The employees, as the term is used in the collective agreements herein, are of course *the members of the local on whose behalf the local has undertaken to supply labour to the employer organization and its component members*. It cannot be said that the agreements were designed to operate and in fact operated only after the members of the Locals reported to work. The agreements contemplate a relationship under which both parties have obligations commencing the effective date of the agreement and *under which the Association represents all its members and the Locals represent all their members*.

(emphasis added)

Similarly, the Ontario Court of Appeal, in deciding in *Blouin Drywall Contractors Ltd.* (1975), 57 D.L.R. (3d) 199; 8 O.R. (2d) 103, that a trade union could claim monetary damages on behalf of its members for breach of the hiring-hall provisions of the collective agreement even though none of its members were technically “employees” at the time, had this to say, at pages 112 and 113:

. . . Collective agreements in this industry have developed to include benefits to non-employees who are union members. In this industry, there is no continuing employment and so collective agreements have developed to ensure a source of labour to the contractor, to provide for preference in the employment of trade union members and, while establishing the terms and conditions of such employment, to provide other benefits which may become due or payable at a time when the union member is not employed.

. . .

In my opinion, the grievance for the loss of the benefit in terms of the loss of wages, was maintainable either as a grievance by the *non-employee* members of the union *or by the union on their behalf*.

(emphasis added)

19. In the same way, we find that a trade union must be said to continue to “represent” its members as “employees” during the course of a strike, at least with respect to the very work to which its members would have been assigned had the strike not intervened. As a matter of common sense, we would have been inclined to this view even without the assistance of section 1(2) of the Act, which provides:

For the purposes of this Act, no person shall be deemed to have ceased to be an employee by reason only of his ceasing to work for this employer as the result of a lock-out or strike or by reason only of his being dismissed by his employer contrary to this Act or to a collective agreement.

The same conclusion is necessary to give any effect at all to the words “all the employees represented by all affiliated bargaining agents” in, e.g., section 148(1), once a strike is in progress. What this means under section 146(2), however, is that an arrangement with *any* person or employer, whereby employee-members perform, or are permitted by their bargaining agent to perform, work which, but for the strike, would have been performed by the employer who has been struck, is unlawful. The effect of section 146(2) on a striking Union and its members, in other words, is clear and straightforward. If the Union and its members opt for strike action, the members do not thereafter continue to perform the struck work, even for a non-union employer.

20. We use the term “non-union” advisedly, because this case points up the potential anomaly in the use of that designation. Mr. Clifford gave evidence as to the problems which Cadbury Schweppes anticipated from both its unionized plant personnel and the remaining building-trades members on the construction project if the company tried to complete the pipe fitting work with a non-union contractor. Yet when Mr. Christy and the former All-Pro employees were hired to do the job, there was not a hint of trouble. Why? Mr. Burrows admitted having thrown up a picket-line on a job during the course of a collective agreement (when it was unlawful) upon discovering that union work had been transferred to a non-union employer. Yet he apparently never considered doing so in this case, when it would have been lawful. Why? The answer, to the Board, lies in the perception of all of the parties as to whether they considered this job was being carried out “union” or “non-union”. In the same vein, one might ponder what the future will be for Regional, and its relationship with the Union, Cadbury, and its present employees, once this strike is over.

21. This brings us to the question whether the respondents Burrows and Local 463 can be said to have entered into an “arrangement” with Regional Mechanical Services, within the meaning of section 146(2). We are satisfied on the evidence that neither of those respondents took an active role in the initial supply of men to Regional. That does not, however, dispose of the matter. As the *Sikora Mechanical* case, *supra*, made clear, the “arrangement” may consist in knowingly permitting the employment of union members to continue without taking reasonable steps available to the bargaining agent to control it. The Board observed in that case, at paragraph 20, referring specifically to section 148(1) of the Act:

. . . An affiliated bargaining agent is obligated to call or authorize the strike in respect of all employees it represents in the ICI sector and this obligation must be held to be a continuing obligation . . . An affiliated bargaining agent must supervise affected work sites effectively and make reasonable efforts to convey to its members that a strike has been called

and that they are not to work. The affiliated bargaining agent clearly cannot, on a selective basis, sanction the working of its members on particular projects by inaction and comply with its obligations under section 148(1).

These words must apply with equal force to the related prohibition in section 146(2).

22. The kind of steps taken by the respondents Burrows and Local 463 in this case might well have been adequate to meet the duty, provided they were taken *bona fide* and under circumstances in which their members would be likely to take them seriously. Having regard to all of the circumstances in this case, however, including the denial of these respondents of any knowledge of the activities of their members prior to the newspaper accounts (a denial which we cannot, in this case, accept), we do not find the steps taken by the respondents Burrows and Local 463 to be *bona fide*, or likely to be seriously taken that way by their members.

23. On the basis of the foregoing, the Board finds that an “arrangement” presently exists amongst respondent Local 463 and its Business Manager, Chris Burrows, the respondent employer Peter Christy (carrying on business through the respondents Regional Mechanical Services and 375253 Ontario Limited), and his employees who are members of Local 463 and employed at All-Pro’s job site at Cadbury Schweppes at the time that the strike began, in violation of section 146(2) of the Act.

24. The Board accordingly directs and orders:

- (a) that Regional Mechanical Services, 375253 Ontario Limited and Peter Christy and any other employer having notice or knowledge of this Order forthwith cease and desist from employing any person represented by Local 463 or any other trade union affiliated with the employee bargaining agency with which Local 463 is affiliated on construction projects in the ICI sector of the construction industry at which employers for whose employees Local 463 holds bargaining rights were working at the commencement of the strike until the strike is terminated;
- (b) that Regional Mechanical Services, 375253 Ontario Limited and Peter Christy post a copy of the attached Notice marked Appendix at the construction projects referred to in paragraph (a) of this Order at which Regional Mechanical Services or 375253 Ontario Limited were working on July 21, 1982 in a conspicuous place after a copy of it has been signed by Local 463 and delivered to Regional Mechanical Services, 375253 Ontario Limited or Peter Christy, and keep the Notice posted until the strike is terminated;
- (c) that Chris Burrows and Local 463 forthwith take reasonable steps to inform and direct members of Local 463 that they are not permitted to perform work on construction projects in the ICI sector of the construction industry at which employers for whose employees Local 463 holds bargaining rights were working at the commencement of the strike until the strike is terminated;

and in accordance with that direction,

- (d) that Local 463 forthwith sign the Notice marked Appendix and, at its own expense, forthwith deliver one copy to Regional Mechanical Services; 375253 Ontario Limited or Peter Christy and mail a copy to each of its members.
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NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

TO MEMBERS OF UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE
PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA,
LOCAL 463

WE HAVE ISSUED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT LOCAL 463 AND REGIONAL MECHANICAL SERVICES, 375255 ONTARIO LIMITED AND PETER CHRISTY VIOLATED THE LABOUR RELATIONS ACT BY ENTERING INTO AN ARRANGEMENT AFFECTING OUR MEMBERS, AND HAS ORDERED US TO INFORM OUR MEMBERS OF THEIR LEGAL RESPONSIBILITIES UNDER THE ACT.

THE LABOUR RELATIONS ACT, IN ESTABLISHING PROVINCE-WIDE BARGAINING FOR EMPLOYERS AND TRADE UNIONS IN THE INDUSTRIAL, COMMERCIAL AND INSTITUTIONAL SECTOR OF THE CONSTRUCTION INDUSTRY, PLACES CERTAIN OBLIGATIONS AND RESTRICTIONS UPON EMPLOYERS, TRADE UNIONS AND THEIR MEMBERS IN THE EVENT A LEGAL PROVINCE-WIDE STRIKE IS CALLED AGAINST EMPLOYERS IN THAT SECTOR OF THE INDUSTRY.

WE THEREFORE ADVISE YOU THAT YOU CANNOT PERFORM STRUCK WORK FOR ANY EMPLOYER, UNION OR NON-UNION, WHILE OUR STRIKE CONTINUES.

UNITED ASSOCIATION OF JOURNEYMEN AND
APPRENTICES OF THE PLUMBING AND PIPE
FITTING INDUSTRY OF THE UNITED STATES
AND CANADA, LOCAL 463

PER:

BUSINESS MANAGER

This is an official notice of the Board and must not be removed or defaced.

1793-80-JD Labourers' International Union of North America, Ontario Provincial District Council on behalf of its affiliated Local Unions and Labourers' International Union of North America, Local 1036, Complainants, v. **Anchor Shoring Limited** and United Brotherhood of Carpenters and Joiners of America, Local Union 446, Respondents.

Jurisdictional Dispute – Practice and Procedure – Party seeking withdrawal of application subsequent to pre-hearing conference – Respondent submitting that dismissal proper – Board allowing withdrawal stressing need to encourage settlement by withdrawal

BEFORE: M. G. Picher, Vice-Chairman, and Board Members J. Wilson and H. Kobryn.

APPEARANCES: *A. M. Minsky and T. Neil for the complainants; Douglas J. Wray, Matti Rissamen and Karl Ball for the respondent.*

DECISION OF THE BOARD; August, 5, 1982

1. This is a jurisdictional dispute application under section 91 of the *Labour Relations Act*. The parties have gone through the Board's pre-hearing conference process designed to clarify the facts and issues. That process being concluded the applicant now requests leave to withdraw its application. The respondent submits that in these circumstances the application should be dismissed.

2. The purpose of the pre-hearing process in jurisdictional disputes is primarily to define the work in dispute, clarify the positions of the parties and to determine which facts are disputed and which are agreed. A by-product of the process is the opportunity for partial and sometimes entire settlement of the dispute without the necessity of a hearing. In jurisdictional disputes in particular the facts are often not fully known to the unions involved. Pre-hearing exchanges of alleged facts and positions can be of significant help in resolving a dispute or, in some cases, leading the parties to the conclusion that there is no dispute at all.

3. In our view that is a process to be promoted to the fullest extent. Our recent experience with pre-hearing meetings in jurisdictional disputes confirms our belief that they are a positive innovation in the resolution of these kinds of conflicts. Settlements, whether in the form of withdrawals of applications after the discovery of the pre-hearing process or otherwise, are to be encouraged. Declaring a winner and a loser when an applicant seeks to withdraw after the pre-hearing process would not advance that end. As counsel for the respondent noted, the dismissal of an application without a hearing could create in the eyes of the labour relations community an impression of an affirmative determination after recourse to this Board. That possibility could discourage settlements by withdrawal, and could indeed discourage unions making use of the jurisdictional dispute application in the first place. That in turn could cause unions objecting to an employer's assignment of work to resort to more disruptive self-help measures. That is precisely what the jurisdictional dispute provisions of the Act are meant to avoid. Labour relations stability is better served if a union concerned about its work jurisdiction knows it can initiate and later withdraw from a jurisdictional dispute proceeding on a "without prejudice" basis. Given these considerations we see little reason to favour the dismissal of a jurisdictional dispute application when the applicant union seeks to withdraw after the pre-hearing discovery process.

4. It is true that parties should not be put to defending a case before the Board, even on a pre-hearing basis, when an application is patently groundless. There is, however, no suggestion either in this case or generally, that unions deliberately file jurisdictional dispute complaints on spurious or merely speculative grounds. The Board has ample latitude, in any event, to deal with abuse of its process.

5. For the foregoing reasons the Board sees no reason in this case, or in similar cases in the future, to register a dismissal. The application is therefore withdrawn by leave of the Board.

2064-78-R The Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1963, 1747, 2480, 2482, 3227, and 3233, Applicant, v. **A. J. Fish & Son Limited**, Respondent.

Certification – Natural Justice – Practice and Procedure – Reconsideration – Board sending notice of application and usual forms to employer – Employer returning forms to Board with request for explanation – Board not receiving reply or employees list – Whether certification without hearing breach of natural justice – Whether Board revoking certification and conducting hearing

BEFORE: R. A. Furness, Vice-Chairman and Board Members H. J. F. Ade and C. Ballentine.

DECISION OF THE BOARD; August 18, 1982

1. This application for certification was filed on March 13, 1979. The extended terminal date fixed for this application was March 23, 1979. In a decision dated March 26, 1979, the Board issued a certificate to the applicant with respect to a bargaining unit defined as "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the County of Ontario, save and except non-working foremen and persons above the rank of non-working foreman". In its decision dated March 26, 1979, the Board noted that the respondent failed to file a reply, a list of employees and specimen signatures within the time fixed in accordance with the *Labour Relations Act* and the Board's Rules of Procedure.

2. On March 20, 1979, the Registrar of the Board received the following letter which was dated March 15, 1979:

Please find enclosed literature that was sent to my firm.

I have just returned from a two week vacation and on checking with my staff find that no one in our office requested these forms.

If these are new government forms that apply to our type of business, please send me a letter to that effect with a full explanation.

Yours very truly,

“Jim Fish”

A. J. Fish.

This letter was written on the stationery of Arthur J. Fish Limited. The Registrar did not send a letter in reply to the letter dated March 15, 1979.

3. The Board did not receive any further communication from or on behalf of the respondent until it received a letter dated May 4, 1982, from counsel for A. J. Fish and Son Limited and Arthur J. Fish Limited. This letter states:

Recently, our clients, A. J. Fish and Son Limited and Arthur J. Fish Limited (the latter being hereinafter referred to as the “Employer”) received on or about the 6th day of April, 1982 a copy of a grievance from the United Brotherhood of Carpenters and Joiners of America through the Carpenters’ District Council of Toronto and Vicinity, 290 Lawrence Ave. West, Toronto, Ontario against A. J. Fish and Sons, a related company of the Employer, alleging a grievance occurring on April 2, 1982 in that persons other than union carpenters were doing work on a job site at the Renaissance Hotel situated at Kennedy and Highway 401 in violation of Sections 3 (recognition) and 5 (union security) and all other relevant articles of the relevant collective bargaining agreement and seeking full compensation of wages and benefits for work done by those other than union carpenters. This came as a surprise to the Employer since his construction business has always been since 1909 a non-union business and because Arthur J. Fish and Son Limited is an investment company with the Employer being the sole company engaged in the construction business.

As a result, the Employer engaged our firm and both of us caused investigations to be done which resulted in ascertaining that on March 26, 1979 the Ontario Labour Relations Board (“Board”) in its Decision and subsequent Certificate of the same date certified the Carpenters’ District Council of Toronto and Vicinity on behalf of certain locals as the bargaining agent of all carpenters and carpenters’ apprentices in the employ of A. J. Fish and Son Limited in the geographical area known as No. 8 save and except non-working foremen and persons above the rank of non-working foremen.

Our client was surprised and shocked inasmuch as he had never received any notice of the Decision or the above mentioned Certificate, copies of which are enclosed. In fact, on March 15, 1979, Mr. Fish wrote to the Registrar of the Board returning a March 14, 1979 letter bearing your file No. 2064-78-R and transmitting Form 51, Form 52, Form 47, Form 55, Schedules to Form 51 and a copy of your letter to the general

contractors section of the Toronto Construction Association of even date. A copy of Mr. Fish's letter is enclosed from which it can be seen that they were returned unread with a request that:

"... If these are new government forms that apply to our type of business, please send me a letter to that effect with full explanation."

No reply to that letter nor any communication from the Board has ever been received by our clients and they have recently thoroughly checked all their files for such purposes. As stated above, our clients received no advice from the Board in response to Mr. Fish's request or from the Board or the Union or the Construction Association or any of his employees of the certification up to the point of being apprised of this grievance. Since he heard nothing from the Board, Mr. Fish did not post the required Notices of the Application so that none of the permanent employees were ever advised of the certification application or of their right to support or oppose it.

Subsequent to receiving the grievance, Mr. Fish's mother received a telex from Mr. P. E. Whyte advising of his appointment as a Labour Relations Officer in the grievance and pursuant thereto requesting a conference with the parties to endeavour to effect a settlement of the grievance. With such in mind he suggested convening a meeting on Thursday, April 29, 1982 at the Board's offices. Based on the objection of the Employer to the certification and on notice to counsel for the union, that hearing was adjourned.

On April 26, 1982 Mr. Fish received a letter from you as Registrar of the Board dated April 23, 1982 addressed to A.J. Fish and Sons quoting your file No. 0150-82-M enclosing a Notice to Respondent of Referral of Grievance to Arbitration and of a Hearing with a copy of the application and reply forms. Based on what hereinafter follows, an application will be made to the Board on the return of the Notice of Hearing on May 5, 1982 requesting an adjournment of the arbitration until ultimate disposition of the challenge we are hereby making to the Board with respect to the original certification of the affected union.

Background

From the period of March 7 to March 28, 1979, Arthur J. Fish Limited, a non-union construction company, entered into a contract with Markborough Properties Limited, as a non-union employer to provide labour, equipment, tools and supervision to fit and install all hardware to 54 wood doors and 4 transom panels for the construction of an office building at a site located at 6820 Centuriet Argentia, West of Mississauga Road and Highway 401 at 6820 Century Ave., Mississauga, Ontario. Of the 15 employees of the Employer who could possibly fall within the bargaining unit defined in Section 7 of the March 26, 1979 Decision of the Board, a maximum total of 5 employees were working on

the particular site from time to time during the job. At March 13, 1979, the date of the application for certification and on March 21, 1979, being the terminal date fixed for the application as set out in the Notice of Application for Certification (the Decision refers to the terminal date as March 23, 1979) there were only two employees on the job site who apparently signed certificates of membership indicating that monthly dues of \$17.75 were paid for at least one month within the six month period immediately preceding the terminal date of the application. These two individuals were Mr. Pat O'Connell and Mr. Charles O'Neill, temporary carpenters employed by the Employer who were union members but out of union work looking for any work and so employed on a non-union job. Then, there were 15 eligible employees for the union and now there are 24.

Subsequent to March 14, 1979, Mr. O'Connell apologized to Mr. Fish and indicated that under duress and intimidation he and Mr. O'Neill had been forced to sign union documents under threat of being fined by the union and losing their union accreditation [sic]. Since Mr. Fish did not hear from the Board, he thought nothing further of the matter.

In fact, until this grievance, all parties have acted as if there never had been any certification. No deductions for union dues has ever been made by the Employer and Mr. Fish has never been approached by his employees or by the union to do the same. The bargaining agents for the employers have advised Mr. Fish that they never received any notice from the union of the certification as is required pursuant to the terms of the provincial collective agreement, which the union now seeks to uphold. Furthermore, the employer's bargaining agents have advised that they have never considered the Employer to be a member of the Employer's Association and Mr. Fish has never been requested to pay dues or fees to support the employers' bargaining agents. To the best of the knowledge of Mr. Fish none of his full-time employees all of whom were employees in March of 1979 were then or are not now aware of the certification. Indeed, the Notice of Referral of Grievance to Arbitration filed by the union makes no mention of any of the employees of the Employer.

Request

On behalf of our clients, the Board is requested to exercise its jurisdiction pursuant to Section 106(1) of the Labour Relations Act of Ontario and reconsider its Decision and Certificate dated March 26, 1979 pursuant to which the Carpenters' District Council of Toronto and Vicinity on behalf of certain locals were certified as the bargaining agent of all carpenters and carpenters' apprentices in the employ of A. J. Fish and Son Limited in geographical area No. 8 save and except non-working foreman and persons above the rank of non-working foremen, and to revoke the certification. If thought appropriate, the Board is also asked to consider ordering an inquiry into the manner in which the

membership evidence supplied to the Board on the application was obtained.

Material Facts Relied On

1. Improper notice of application sent to the Employer in that Section 9 of Form 51 states that if the Board determines that a hearing of the Application for Certification is to be held, the hearing will take place on Monday, the 2nd day of March, 1979 whereas the Notice is itself dated March 14, 1979 as are all other forms and documents in connection with the application.
2. The wrong party was named as the Respondent in that Arthur J. Fish and Son Limited is a holding company and the Employer is engaged in the construction business.
3. The Board was misled by the evidence filed in connection with the certification application as to complete facts surrounding the union membership of the two individuals in question and that the membership evidence was defective and irregular having been obtained by intimidation and duress.
4. The Board was materially misled by the number of employees in the bargaining unit at the time the application was tested in that a majority was not represented but only 2 out of 15 carpenters and apprentices.
5. The failure to have notices posted denied the opportunity to the other permanent employees of the Employer eligible to be in the bargaining unit and be represented by the union of the certification application and of the right to oppose it or support it.
6. There has been a denial of natural justice in that the Board failed to respond to Mr. Fish's letter of March 14, 1979 in proceeding to consider the matter without his participation and without answering his request thereby denying him the opportunity to be heard and constituting a denial of natural justice to the Employer.
7. The union has failed to inform the employees of the Employer and the Employer of the certification as is required pursuant to the terms of the provincial collective bargaining agreement it now seeks to uphold and has made no request for deductions for union dues.
8. The employers' bargaining agent for the construction industry has never considered the Employer to be a member of the employers' association and has never asked the Employer to pay dues or fees to support the employers' association.

Submissions

As stated above, on the return of the hearing of the referral by the Board of the above grievance to arbitration on Wednesday, May 5, 1981

[sic] an application for adjournment of those proceedings will be made pending ultimate disposition of this request for the Board for reconsideration of its March 26, 1979 Decision and certification. If necessary, an application to court to stay these proceedings will be brought.

This application for reconsideration has been made with all due diligence and dispatch since the matter first came to the attention of our clients on or about April 6, 1982 and is not made for delay or any other improper purpose. Rather, the Board is asked to reconsider its March 26, 1979 decision and certification based on the errors and facts now at light above identified.

All of which is respectfully submitted.

4. A copy of the letter dated May 4, 1982, was sent by the Board to the applicant. On May 25, 1982, the Board received the following letter (also dated May 25, 1982) from counsel for the applicant:

We are acting on behalf of the Applicant in this matter.

We understand that the Respondent by letter dated May 4, 1982 is requesting that the Board reconsider its decision and certificate dated May 26, 1979, pursuant to *Section 106(1)* of the Act.

The Applicant's position is that the request for reconsideration should be denied without the necessity of a Board hearing.

The Board has consistently exercised its discretion under *Section 106(1)* in a cautious manner. Reference is made in the case of *Imperial Tobacco Products (Ontario) Limited*, (1974) OLRB Rep. September 609, to this discretion as a "unique jurisdiction" and in paragraph 3 of that decision the Board states its reason for caution:

"However, this jurisdiction is very carefully and cautiously exercised by the Board in that free recourse to the Board after the initial disposition of a matter would substantially undermine those values of speed and economy associated with the administrative practice of the Board."

The general grounds on which the Board will reconsider a decision are set forth in the Board's decision in the case of *Canadian Union of General Employees*, (1975) OLRB Rep. April 320:

"Generally, the Board will not reconsider a decision unless a party proposes to adduce new evidence which could not previously have been obtained by reasonable diligence and the new evidence is such that, if adduced, it would be practically conclusive or a party wishes to make representations or objections not already considered by the Board that he had no opportunity to raise previously.

(International Nickel Co. of Canada Ltd. [1963] OLRB Rep. 234, 64 CLLC ¶16,260). Both legs of this principle depend upon the applicant having been diligent and therefore having had no opportunity to draw the Board's attention to the object of its concern."

In the instant case, it is submitted that the Respondent has not indicated any basis upon which the Board should exercise its discretion pursuant to *Section 106(1)* of the Act to reconsider its earlier decision.

In this case, the Applicant applied for certification on March 13, 1979. The Board acknowledged receipt of the application by letter dated March 14, 1979. In the same letter, the Applicant was advised that the terminal date had been fixed for March 21, 1979, and that if a hearing was to be held, it would be held on Monday, April 2, 1979. Membership evidence and a Form 54 Declaration was sent to the Board on or before the terminal date. The applicant was sent a copy of the Board's decision and certificate dated March 26, 1979 by covering letter from the Board dated March 27, 1979.

Dealing specifically with the eight (8) material facts set out on pages 4 and 5 of the Respondent's May 4, 1982 letter in support of the request for reconsideration, the Applicant's position (using the Respondent's numbering) is as follows:

1. The Applicant has no knowledge whether Form 51, paragraph 9 sent to the Respondent referred to Monday, March 2, 1979. The Notice sent by the Board to the Applicant dated March 14, 1979 stated that if the Board determines to hold a hearing, it would be on Monday, April 2, 1979.

We note that even if the Notice sent to the Respondent dated March 14, 1979 stated that if a hearing was to be held it would be held on Monday, March 2, 1979 (as is alleged in the Respondent's May 4, 1982 letter), the Respondent ought to have realized the mistake. The Board's letter was dated March 14, 1979; March 2, 1979 did not fall on a Monday (rather, on a Friday), and April 2, 1979 did fall on a Monday.

More importantly and in any event, the possible error on Form 51 sent to the Respondent is completely irrelevant and had no bearing in the case. The fact is that there was no hearing — the Respondent was, therefore, not prejudiced. It was the Respondent's failure to complete the Reply to the application which had been sent to it (including the failure to request a hearing as provided for in paragraph 14 of Form 55) which led to a certificate issuing without a Board hearing. This is entirely in accordance with the Board's Rules of Procedure and paragraph 8 of the Form 51 which was sent to the Respondent.

In addition, of course, there was and is no requirement for the Board to hold a hearing and the Board's practice in the construction industry is not

to schedule a hearing unless there are valid grounds requiring a hearing before the Board disclosed in the Respondent's Reply — *Section 102(14)* of the Act.

2. The Applicant named the Respondent on the basis of information supplied by employees and the name appearing on trucks seen on the project at the time. We note that the Respondent responded to the application using the letterhead of "Arthur J. Fish Limited" which has the same address as the named Respondent. If the wrong corporate entity was named, it is solely the fault of the Respondent for not correcting any mistake (as is provided for in paragraph 1 of Form 55). There is certainly no allegation that Arthur J. Fish Limited failed to receive notice of the application.

3. The Applicant challenges the status of the Respondent employer to raise this objection at all. The Applicant further submits that the Respondent not be permitted to raise the allegations three years later. Pursuant to what is now Rule 72, the Board has required the prompt filing of particulars of any misconduct. The Board's practice has been to refuse to entertain such allegations not filed in a timely fashion.

See, for example:

V. Trigiani Contracting Ltd. (1979) OLRB Rep. February 141.

Cable Tech Wire Company Limited, (1978) OLRB Rep. June 496.

Magna-Cote (Division of Magna International Inc.) (1978) OLRB Rep. May 433.

4. The Applicant was not aware of any employees employed by the Respondent in the bargaining unit on the date of application other than the two(2) for whom membership evidence was submitted. If there were more employees in the unit (which the Applicant does not admit) once again, it is solely the fault of the Respondent that the Board was not advised — see Form 51, paragraph 8, Form 55 and attached schedules.

5. It is submitted that the Respondent cannot rely on its own default if it failed to post notices as a ground for its own request for reconsideration.

6. It is submitted that the application was handled in accordance with the provisions of the Act and the Board's Rules of Procedure and Regulations. The Forms sent to the Respondent are patently self-explanatory. The Respondent apparently returned the Forms to the Board and asked for an explanation. It can only be assumed the Respondent did not even read Forms, which, in our submission, is not grounds for requesting reconsideration.

7. and 8. It is submitted that these paragraphs are not relevant to the

Respondent's request for reconsideration of the Board's March 26, 1979 certificate.

Finally, it is submitted that the Respondent's allegation that it did not receive a copy of the Board's decision or certificate does not affect the validity of the certificate. Even if true (which is not admitted) it is submitted that, at most, this only could be used to explain the delay in requesting reconsideration of the Board's certificate. This is not a case where the Respondent is alleging it did not receive notice of the application.

In summary, it is submitted that there is no new evidence or representations which the Respondent could not have made prior to the Board's decision. The Respondent alone is responsible for its failure to respond to the application for certification. The Applicant respectfully requests that the Board dismiss the request for reconsideration, without the necessity of a hearing.

We have taken the liberty of delivering a copy of this letter to Respondent's counsel.

5. On June 1, 1982, the Board received the following letter, which was dated May 31, 1982, from counsel for A. J. Fish and Son Limited and Arthur J. Fish Limited:

We hereby reply to the May 25, 1982 letter of counsel for the Carpenters' District Council of Toronto and Vicinity, sent in furtherance of our application by letter dated May 4, 1982, under Section 106(1) of the Ontario Labour Relations Act which letter requested the Board to reconsider and revoke its earlier March 26, 1979 Decision and Certificate for the above union. Counsel for the union has asked the Board to deny our request for reconsideration without the necessity of a Board hearing.

To this we must disagree and re-affirm our original request.

General Reply

The Board's power to reconsider is plenary, independent one entitling it to deal with cases not specifically otherwise provided for in the Act. Here, we submit, those exceptional circumstances exist which justify the Board exercising its discretion and are listed in our May 4th letter. There has been a litany of errors which, if not corrected, will amount to a breach of natural justice not only for our client, but more particularly for those employees who have never had an opportunity to know or participate in any of the proceedings before the Board to date.

Material Facts

1. Our client has been diligent and could not be said to be deemed to realize the mistake in the Board's Form 51, paragraph 9. There is nothing

more fundamental to justice than the holding of a hearing to enable all sides to present their respective cases. Otherwise, as in this case, prejudice results not only for the employer, but for all affected employees. Our client did not fail to complete the Reply, as alleged, but asked the Board for its advice, which was not forthcoming. Reasonable diligence on the part of our client therefore exists, especially since no Decision or Certificate was ever received. There also existed at the time valid grounds for holding a hearing. We refer the Board to the material facts in our May 4th letter.

2. The wrong employer is named which causes prejudice in light of all attending circumstances.

3. Our client has promptly filed before the Board particulars of the misconduct alleged. Timeliness exists because our client was unaware that anything material was taking place before the Board in 1979 and has filed the information as soon as it became known to be material.

4. The union has made no attempt to contact our client concerning collective bargaining for all employees it claims to represent. This is in breach of the collective bargaining agreement. In fact, the failure of the Board to be informed of the number of all affected employees amounted to a material misrepresentation before the Board.

5. Our client is not relying on its own misconduct but asks the Board to protect those most vitally affected employees who have never had any notice of the proceedings before this Board.

6, 7 and 8. We rely on our submissions.

In conclusion, we ask the Board in light of all the circumstances at hand to reconsider its earlier Decision and Certificate.

All of which is respectfully submitted.

6. The revival of interest in the instant application commenced after the applicant, as presently constituted, filed a referral of grievance to arbitration under section 124, construction industry, with the Board on April 20, 1982, in which A. J. Fish & Sons was named as the respondent. See Board File No. 0150-82-M. The referral contains a grievance concerning the interpretation, application, administration or alleged violation of a collective agreement. The referral is presently before a differently constituted division of the Board. In a decision in Board File No. 0150-82-M dated May 7, 1982, the Board stated:

2. The parties are agreed that this matter should be adjourned until the applicant's request, contained in a letter from its solicitors to the Board dated May 4, 1982, that the Board reconsider its decision in board File No. 2064-78-R to certify the applicant which issued March 26, 1979 is determined by the Board. Agreement by the applicant to the adjournment is without prejudice to any right to make written submissions to the

Board on the May 4th letter, which its counsel has undertaken to do by the week commencing May 10th.

3. Should the Board refuse the request for reconsideration or decline to exercise its discretion to vary or revoke its decision in Board File No. 2064-78-R, this matter will be re-listed for hearing. The Board notes, however, the parties' undertaking that they would attempt to resolve this grievance if, after the request for reconsideration has been determined by the Board, the applicant still holds bargaining rights.

7. Issues have been raised before the division of the Board in the instant application which, in our opinion, are more properly raised before the division of the Board in Board File No. 0150-82-M. In the instant decision, the Board proposes to deal with only the matters which relate to the issuance of the certification on March 26, 1979. Where the parties have addressed their representations to the present existence of bargaining rights and to the subsequent conduct of the parties and other persons, such representations are more properly considered by the divisions of the Board in Board File No. 0150-82-M.

8. There can be no doubt that the respondent received notice of this application for certification. The central event which gives rise to this request for reconsideration results from the failure of Mr. Fish to read the material from the Board and his request that the Registrar send him a letter with a full explanation. The material which was sent to the respondent states in a concise manner what the respondent is required to do. The material is written in plain English clearly sets forth the consequences of failing to file a reply and accompanying documents. Paragraph 8 of Form 51 states:

8. IF YOU FAIL TO FILE A REPLY OR THE LIST OF EMPLOYEES AND DOCUMENTS CONTAINING SIGNATURES AS SET OUT ABOVE WITHIN THE TIME FIXED BY PARAGRAPH 5 OF THIS NOTICE OR IF YOUR REPLY IS INCOMPLETE, THE BOARD MAY PROCEED TO DISPOSE OF THE APPLICATION ON THE EVIDENCE AND REPRESENTATIONS BEFORE IT WITHOUT FURTHER NOTICE TO YOU AND WITHOUT A HEARING.

Paragraph 2 of Form 51 also states:

2. You are required to post the enclosed Notice to Employees of Application (Form 52), immediately. These notices are to be posted in conspicuous places where they are most likely to come to the attention of all employees who may be affected by the application. You shall keep them posted upon your premises until the close of business on the terminal date shown in paragraph 4.

The respondent was further advised in paragraph 9 of Form 51 that if a hearing was to be held it would take place on Monday, the 2nd day of March, 1979. However, that paragraph also states that if the Board determines that such a hearing take place, the respondent would be served with a Notice of Hearing in Form 53. In our opinion, it is readily apparent that the date of "Monday, the 2nd day of March, 1979" was an error because as the date of the possible hearing it occurred prior to the date of March 14, 1979, which was the date on Form 51. These

facts, however, do not obscure the admission that Mr. Fish did not read the material and the fact that the Board did not hold a hearing of this application. In applications for certification which are filed under the construction industry provisions of the Act, the Board need not hold a hearing. See section 102(14) of the Act. This provision of the Act explains the conditional nature of paragraph 9 in Form 51. The Board did not hold a hearing in this application because, as far as the Board was aware, there was no issue in dispute between the applicant and the respondent.

9. The respondent by its conduct disentitled itself from raising issues in March of 1979 which the Board would have considered. At that time the Board could have investigated any differences in the list of employees by appointing a Labour Relations Officer. Similarly, the Board could have entered the representations of the applicant and the respondent with respect to any alleged mistake in the names of parties under the provisions of section 104 of the Act. In addition, allegations of improper or irregular conduct (the intimidation and duress subsequently alleged by counsel for A. J. Fish and Son Limited and Arthur J. Fish Limited), if they had been filed with the Board promptly upon discovering the alleged conduct, could have been inquired into by means of a hearing before the Board. However, where such allegations have not been filed promptly upon discovering same, the Board has a discretion whether to entertain such allegations. See section 72 of the Board's Rules of Procedure. These various possibilities would have constituted a reason for holding a hearing of this application in April of 1979. The conduct of Mr. Fish in returning the material to the Board deprived himself of raising the issues which his counsel now attempts to raise. It is not an answer to the present state of affairs in this application to say that the Registrar did not reply to Mr. Fish's letter dated March 15, 1979. There is nothing in the Act, the Board's Rules of Procedure and the material sent to the respondent by the Registrar which constitutes a holding out that the Registrar would enter into correspondence of the nature apparently desired by Mr. Fish. The respondent did not co-operate with the Board in the processing of this application and, indeed, did not post Form 52, Notice to Employees of Application for Certification, Construction Industry, although, as stated earlier, this requirement is clearly set forth in paragraph 2 of Form 51. Because of the conduct of the respondent, it was necessary for the Board in a decision dated March 16, 1979, to extend the terminal date from March 21, 1979, to March 23, 1979, and serve by mail the employees who were known to the Board to be affected by this application. The Board served Form 52 on each of the two employees who were known by the Board to be affected by this application. As far as the Board was aware, no other employees were affected by this application. The Board did all that it would do when faced with the lack of co-operation and a reply from the respondent.

10. The Board has not denied anyone natural justice in this application. The respondent was served with notice of this application and was given a reasonable opportunity to make its position known to the Board. If Mr. Fish, A. J. Fish and Sons Limited and Arthur J. Fish Limited believe that they have been prejudiced and denied natural justice, then such a state of affairs is of their own making and due to their own intransigence. They are very much the authors of their own misfortune. The board proceeded to issue its decision in this matter on the basis of the material before it on March 26, 1979.

11. In the absence of a denial of natural justice and with the failure of counsel for A. J. Fish and sons Limited and Arthur J. Fish Limited to allege any matters which with due diligence could not have been filed before the Board in a timely fashion in March of 1979, the Board is not prepared to reconsider, vary or revoke its decision or certificate dated March 26, 1979, pursuant to the provisions of section 106(1) of the Act. The Board has considered the

facts and the arguments raised before it and is of the opinion that no useful purpose would be served in holding a hearing of this request for reconsideration. Accordingly, the request for a hearing is denied.

12. While the Board has the jurisdiction to reconsider, vary or revoke its decisions, such a jurisdiction is exercised carefully and cautiously, having regard to the merits of each request. Clearly, in a tribunal such as the Board there must be finality to its proceedings after the parties have been given an opportunity to present their representations to the Board. The exceptional factors referred to in *Canadian Union of General Employees*, [1975] OLRB Rep. April 320 are not present in the instant application. The allegation that other employees did not receive notice of this application remains an allegation and the Board notes that the alleged lack of notice to such employees is entirely the responsibility of the respondent. The allegations of improper or irregular conduct raised by A. J. Fish and Sons Limited and Arthur J. Fish Limited were not made in accordance with the provisions of section 72 the Board's Rules of Procedure and the Board, in the exercise of its discretion, will not entertain such allegations.

13. The matters raised with respect to the conduct of the applicant and third parties after the issuance of the certificate are matters which are more properly raised before the division of the Board in Board File No. 0150-82-M. The Board notes that a copy of the decision and certificate dated March 26, 1979, was mailed to the respondent on March 27, 1979. Moreover, a copy of the decision of the Board dated March 16, 1979, was mailed to the respondent on March 16, 1979. Neither of these letters has been returned to the Board by the Post Office.

0461-82-R Food and Service Workers of Canada, Applicant, v. Bond Place Hotel, Respondent.

Bargaining Unit – Certification – Employee – Whether hotel switchboard operators excluded from all employee unit – Community of interest with office and front desk staff – Practice at other hotels not proper basis for determination – Whether employee discharged on application date included in list of employees.

BEFORE: Ian Springate, Vice-Chairman and Board Members J. Wilson and B. L. Armstrong.

APPEARANCES: *M. Cornish, N. Howes and M. Schuster for the applicant; M. Contini and S. Pustil for the respondent.*

DECISION OF THE BOARD; August 19, 1982

1. This is an application for certification. The respondent operates a hotel in the city of Toronto.

• • •

3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

4. The parties are in general agreement as to the description of two bargaining units, namely a “full-time” and a “part-time” unit. They agree that office staff and front desk staff should be excluded from both bargaining units but disagree as to whether or not switchboard operators should also be excluded.

5. As far as we are aware, the Board has not previously been called upon to rule on the issue of whether hotel switchboard operators should be excluded from an “all employee” bargaining unit along with office and front desk staff. The respondent led evidence to establish that at the other major hotels in downtown Toronto, the hotel and the union involved have agreed to exclude front desk and office staff from the “all employee” bargaining unit, but not to exclude switchboard operators. The respondent contends that the Board should follow this practice in the instant case. We are unable to accept this contention. Firstly, we do not know what considerations led to the exclusion of the switchboard operators at the other hotels. Further, we are of the view the Board should decide the issue in this case not on the basis of what is done at other hotels, but rather on the basis of the evidence put before us with respect to the respondent’s hotel.

6. The evidence before us indicates that only one switchboard operator is on duty at the hotel at any one time. The switchboard operator sits in a small room behind the front desk. There is no door in the entrance between this room and the front desk. The switchboard operators answer in-coming calls to the hotel, and also make the wake-up calls in the morning. With information cards supplied by the front desk staff, the switchboard operators maintain an up-to-date alphabetical list of hotel guests. The operators also take messages for hotel guests who are not in their rooms. The switchboard operator on duty will put one copy of message into a slot at the front desk, and put another copy in an envelope on the front desk so that it can later be picked up and taken to the guests room by a bell-boy.

7. No switchboard operator is on duty between 11:00 p.m. and 7:00 a.m. During those hours, all incoming calls are taken either by the Front desk staff or by a security guard. The front desk staff take any wake-up call requests after 11:00 p.m. and make the wake-up calls prior to 7:00 a.m.

8. Unlike most staff in the hotel who are supervised by a manager, who in turn reports to Mr. N. Karim, the hotel’s general manager, the switchboard staff and the front desk staff both report directly to Mr. Karim.

9. Given the above facts, we are of the view that the community of interest of the switchboard operators lies more closely with the front desk and office staff than it does with the employees agreed to be in the bargaining units. This being the case, switchboard operators will be excluded from both bargaining units. Having regard to this conclusion, and the agreement of the parties with respect to all other issues relevant to the description of the bargaining units, the Board finds the following to be units of employees appropriate for collective bargaining:

“FULL-TIME” UNIT:

All employees of the respondent in the Municipality of Metropolitan

Toronto employed at the Bond Place Hotel, save and except supervisors, persons above the rank of supervisor, office staff, front desk staff, switchboard operators, security personnel, persons regularly employed for not more than twenty-four hours per week, and students employed during vacation period.

“PART-TIME UNIT:

All employees of the Respondent at the Bond Place Hotel in the Municipality of Metropolitan Toronto regularly employed for not more than twenty-four hours per week and students employed during the school vacation period save and except supervisors, persons above the rank of supervisor, office staff, front desk staff, switchboard operators and security personnel.

10. The applicant contended that a number of persons whose names were included on the list of employees prepared by the respondent exercised managerial functions within the meaning of section 1(3)(b) of the Act, and hence were not employees within the bargaining unit. During the hearing, the respondent withdrew its challenges with respect to two of these persons. With respect to two others, namely, Maria Sousa and Denyse Guite, the Board ruled orally that notwithstanding their limited supervisory functions, neither of them exercised the type of independent decision making associated with persons who exercise managerial functions.

11. The Board also heard evidence with respect to yet another person on the list of employees who according to the applicant exercises managerial functions, namely, Mr. Michael Erwin. Mr. Erwin testified that he is classified as a “duty cook”. In mid April of 1982 the Hotel discharged its chef. During the following two and a half weeks, until a new chef was hired, Mr. Erwin served as the acting chef. We are satisfied that while serving as the acting chef Mr. Erwin did exercise managerial functions. We are further satisfied, however, that Mr. Erwin ceased to perform any managerial functions prior to June 4, 1982 the date of the filing of the application, and that accordingly his name was appropriately included on the list of employees.

12. During the hearing the Board orally upheld the applicant’s contention that the name of Mr. Fred White should be added to the list of employees. Mr. White was terminated at about 8:05 a.m. on June 4, 1982, the application date, shortly after he arrived at the Hotel. Mr. White did not actually perform any work on the day in question. In our view, Mr. White remained an employee of the respondent until such time as he was actually terminated, and hence he was an employee of the respondent for part of the application date. The application for certification was mailed by way of registered mail to the Board on June 4, 1982. Although no evidence was led on point, it is reasonable to assume that it was actually mailed some time after 8:05 a.m. when Mr. White was discharged. In our view, however, the test is not whether Mr. White was an employee at the precise time that the application for certification was mailed, but whether he was an employee on the date of mailing. In this regard we would adopt the following reasoning of the Board in *Windsor Tube & Metal Inc.* [1977] OLRB Rep. June 396:

“The Board has always taken the view that employee status is determined as of *the day* that the application for certification is made, rather than the

precise time of mailing. In this respect, the phrase “time of mailing” in the Rule (now Rule 75) is intended to mean the *date of mailing* — which is all that the registration stamp would indicate. Section 102(2) (now section 113(2) of the *Labour Relations Act* provides as follows:

An application for certification or accreditation or for a declaration that a trade union or employers’ organization no longer represents the employees or employers, as the case may be, in a bargaining unit, if sent by registered mail addressed to the Board at Toronto, shall be deemed to have been made *on the date* on which it was so mailed.

There can be no doubt that the application for certification is deemed to have been made *on the date* on which it is mailed. In our view, this is the time the application was made for the purposes of section 7(1) of the Act. Indeed, the schedules which the employer is required to submit to the Board, together with its reply (and which must be in the form specified by the regulations), all require the employer to list employee status *on the date* of the application for certification. There is no doubt in this case that the 7 discharged persons were “employees” on the date on which the application was mailed and, therefore, by virtue of section 102, were “employees” on the date on which the application was mailed and, therefore, by virtue of section 102, were “employees” “when the application was made”. In our view, therefore, these 7 persons were employees “at the time the application was made” and it is unnecessary to defer our consideration until the completion of the section 79 proceedings. Whatever the outcome to those proceedings, the employees’ status cannot be affected, since it is our view that they were, in fact, employees in the bargaining unit at the time the application was made. Even if it can be said that the phrase “time the application was made” is ambiguous, it is our view — having regard to section 102 and the entire scheme of the Act and Rules — that employee status is to be measured as at the *date* on which the application is made. See *United Steelworkers of America v. Amplifone Canada Ltd. v. Group of Employees*, [1967] OLRB Rep. Dec. 840 where the Board found that employees who presented themselves at their place work in the reasonable expectation of carrying on their normal employment must be found to be employed on the date they so reported, notwithstanding the fact that they were laid off indefinitely without performing any work on that same date.”

(emphasis added).

In these circumstances, we are satisfied that Mr. White is appropriately regarded as a bargaining unit employee for the purpose of section 7(1) of the Act.

13. Two challenges remain with respect to the accuracy of the lists of employees. These challenges relate to Mr. S. Dowdell and Miss N. Howes, both of whom were discharged by the respondent prior to the application date. It is the contention of the applicant that both of these individuals were discharged because of their activities on behalf of the applicant, and accordingly pursuant to section 1(2) of the Act they are deemed to have remained employees of

the respondent. If the applicant's contention is correct, Mr. Dowdell's name should be included on the list of employees in the "full-time" unit and Miss Howes on the list of employees in the "part-time" unit. To date the applicant's allegations with respect to Mr. Dowdell and Miss Howes have not been inquired into. In terms of revealing the applicant's membership position, the Board was advised at the hearing that all of the parties were now aware that both Mr. Dowdell and Miss Howes had signed applications for membership in the applicant trade union.

14. On the basis of all of the evidence before us, we are satisfied that on the date of the making of the application there were, depending upon the status of Mr. Dowdell, either 76 or 77 employees in the "full-time" bargaining unit. The applicant filed evidence of membership on behalf of 42 (or 43 counting Mr. Dowdell) of these employees. Accordingly, we are satisfied that more than fifty-five per cent of the employees of the respondent in the "full-time" bargaining unit at the time the application was made, were members of the applicant on June 15, 1982, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act. It is to be noted, however, that a number of persons who had become union members also signed statements of desire in opposition to the application. The circumstances surrounding the origination and circulation of these statements of desire have not as yet been inquired into.

15. We are satisfied that on the application date there were, depending on a final resolution with respect to Miss Howes, either 25 or 26 employees in the "part-time" bargaining unit on the date of the filing of the application and that either 11 or 12 of these employees were members of the applicant on June 15, 1982. Accordingly, the Board is satisfied that at the relevant time fewer than forty-five per cent of the employees in the "part-time" bargaining unit were members of the applicant.

16. The Board notes that the applicant has requested that it be certified pursuant to the provisions of section 8 of the Act if it is not otherwise entitled to outright certification.

17. The matter is to be re-listed for hearing to hear the evidence and the representations of the parties with respect to all outstanding issues.

18. The matter is referred to the Registrar.

0372-82-R Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters Chauffeurs, Warehousemen and Helpers of America, Applicant, v. **Brinks Canada Limited**, Respondent, v. Group of Employees, Objectors.

Certification Where Act Contravened – Unfair Labour Practice – Two employees in unit – One well known as union supporter other as union opponent – Employer arguing its unlawful conduct could not affect employees' ability to vote freely – Board rejecting argument and certifying union without vote

BEFORE: M. G. Picher, Vice-Chairman, and Board Members J. A. Ronson and S. Cooke.

APPEARANCES: *Ken Petryshen and Al LeFort for the applicant; James E. Bowden, E. V. Johnson, Arthur Morin, and James Mulrooney for the respondent; Terrance J. Schisler for the objectors.*

DECISION OF M. G. PICHER, VICE CHAIRMAN & BOARD MEMBER S. COOKE;
August 17, 1982

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. Having regard to the agreement of the parties the Board further finds that all employees of the respondent at North Bay, save and except dispatchers, persons above the rank of dispatcher, office, clerical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students during the school vacation period, constitute a unit of employees of the respondent appropriate for collective bargaining (hereinafter referred to as bargaining unit #1).
4. Having regard to the agreement of the parties, the Board further finds that all employees of the respondent at North Bay, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except dispatchers, persons above the rank of dispatcher, and office, clerical and sales staff, constitute a unit of employees of the respondent appropriate for collective bargaining (hereinafter referred to as bargaining unit #2).
2. The membership strength of the union is fifty per cent of the employees in each bargaining unit That would normally cause the Board to order a representation vote among the employees in each unit. In this case, however, the union alleges that the employer has violated the *Labour Relations Act* by intimidating the employees in respect of their job security in such a way as to prevent the free expression of their true wishes concerning union representation. It therefore requests certification under section 8 of the Act.
6. The respondent operates an armoured car delivery service at North Bay. Its establishment at that location is small, having two full-time and six part-time employees, all of whom are under the direction of the branch manager, Mr. Arthur Morin.

7. The evidence establishes that one of the full-time employees, Mr. Blake Smith, was the principal proponent of union representation for the respondent's employees at North Bay. While he did not have the support of his full-time counterpart, Mr. Terrance Schisler, Mr. Blake did get support from at least three of the six part-time employees, all of whom joined the union at a meeting on April 21, 1982. This application was filed on May 20, 1982.

8. The evidence establishes that when Mr. Morin learned of the application for certification he called a meeting of all of the employees at North Bay at the respondent's depot on Saturday, May 29, 1982. Six of the eight employees attended. Mr. Morin began his discussion with the employees by accurately singling out and identifying each one who had joined the union. He then explained that there were only ninety man-hours of work per week available in the branch, forty of which were then regularly assigned to Mr. Schisler. He stated that if the union were certified and succeeded in bargaining a full forty hour work week for Mr. Smith, who was then working only twenty-five and a half hours, there would only be ten hours of work left in the week to be divided among the six part-time employees. He further stated that if the company were forced to pay the union rate it could close its North Bay branch. Mr. Morin then asked Mr. Smith how he felt as the person responsible for closing the North Bay office and putting everyone out of work.

9. Towards the latter part of the meeting, which lasted approximately an hour and a half, Mr. Schisler took from his pocket a typed petition, dated the same day, in opposition to the union. He announced to those present that he for one opposed the union and was prepared to go on record as being the first to sign it, which he did in the presence of Mr. Morin. All of the employees present except Mr. Smith signed the petition immediately after him also in the presence of the branch manager. The following Monday, May 31, 1982, one of the employees who had been absent from the meeting and who had previously been a union supporter, Mr. W. J. Duggan, signed a similar document.

10. The response of the employees was perhaps best summarized by Robert J. Barnes, a union supporter, who signed the petition: "I told everyone I wasn't in a position to jeopardize three regular employees' jobs for a union. . . . After the meeting I went to see Barry Chapelle (the other employees who had been absent). He'd signed for the union. I told him I didn't feel I could be responsible for closing the office. He agreed." The petition indicates that it was signed by Mr. Chapelle the next day, May 30, 1982.

11. It would be difficult to imagine a more obvious violations of the Act by an employer to justify the granting of certification under section 8 of the Act. When an employer makes a threat which effectively tells an employee that to choose a union is tantamount to choosing unemployment, the ability of the employee to exercise any free choice is obviously removed. While Mr. Schisler indicated that he felt Mr. Morin's statements were largely "bluff", three of four employees who had joined the union obviously took a different view. From the earliest cases since the introduction of section 8 into the Act, the Board has consistently found that direct threats to the job security of employees are violations of the Act which trigger the operation of section 8 of the Act. (*Dylex Ltd.* [1977] OLRB Rep June 357; *Viceroy Construction Co. Ltd.* [1977] OLRB Rep Sept 562; *Radio Shack* [1979] OLRB Rep Mar. 248).

12. Counsel for the respondent submits that with respect to the full-time bargaining unit the third element of section 8, namely, that the true wishes of the employees are not likely to be disclosed, is not made out. He argues that even if there has been a violation of the Act, it

has not affected the ability of the two employees in the full-time unit to make their choice. In this regard he points to the testimony and demeanour of Mr. Schisler and Mr. Smith, submitting that notwithstanding the employer's statements each of them remain strongly anti-union and pro-union respectively. He submits that the Board should have no concern about the ability of these two full-time employees to freely express their wishes respecting union representation as their positions were well demonstrated both in the events surrounding the application and at the hearing.

13. We cannot agree. Firstly, the Board's procedures do not favour the taking of *viva voce* evidence from employees in the presence of their employer at a Board hearing as the optimal means of determining their wishes respecting union representation. The Board's jurisprudence has long recognized the natural affinity of an employee to identify, publicly at least, with the interests of his employer.

14. In our view, the situation is no different because in the past Mr. Schisler may have opposed union representation and continued to do so during the applicant's campaign. Section 8 of the Act speaks not to the past, but to the present and the future:

Where an employer ... contravenes this Act so that the true wishes of the employees ... *are not likely to be ascertained* ...

15. The Act contemplates the state of an employee's mind at the time he or she might be called upon to express a choice, whether it be in supporting a union membership drive or in a representation vote. In the instant case the issue is whether Mr. Schisler can freely cast his ballot in a union representation vote to be conducted by the Board. We do not see how he can. By equating union certification with almost certain unemployment, the employer has for all practical purposes deprived Mr. Schisler, or any reasonable employee in his position, of the most essential element of freedom — the ability to change his mind. If there was even a chance that Mr. Schisler could be persuaded to support a union, that chance must have been entirely eliminated by his employer's threats. By the same token the respondent's actions have unfairly deprived the applicant union of the opportunity, free of intimidation and undue influence from the employer, to persuade Mr. Schisler to its point of view. Having placed a chain around an employee's neck, the employer should not now be heard to say that the chain should be disregarded because it was never necessary in the first place.

16. We have no less concern for the expression of Mr. Smith's choice. While Mr. Smith has obviously been instrumental both in the union's membership campaign and in the presentation of its case against the respondent at the hearing, the Board cannot know with certainty that the respondent's threats will not ultimately have their impact on Mr. Smith. In our view it is entirely possible that Mr. Smith might become persuaded, as some of his fellow employees obviously have, that to vote for the union is to vote himself or others out of a job. It is precisely the likelihood of that kind of ballot which the act intended to avoid by the provisions of section 8 of the Act. Having failed to frighten Mr. Smith at first, it is not for the employer to now assure the Board that Mr. Smith will remain unaffected by its threats. In these circumstances the Board cannot conclude with any acceptable degree of certainty that the true and unqualified wishes of the employees are likely to be ascertained.

17. With a membership strength of fifty per cent in each unit, we are satisfied that the applicant has support sufficient for collective bargaining. The Board therefore grants

certification pursuant to section 8 in respect of both bargaining units. Certificates will issue accordingly.

DECISION OF BOARD MEMBER J. A. RONSON;

Dissent of Board Member J. A. Ronson to follow.

0050-82-JD The International Union of Bricklayers and Allied Craftsmen and its Local 10; and The Ontario Provincial Conference of The International Union of Bricklayers and Allied Craftsmen, Complainant, v. The International Brotherhood of Painters and Allied Trades; the Ontario Council of the Int'l Brotherhood of Painters and Allied Trades; and The International Brotherhood of Painters and Allied Trades, Local 1891 and **Brunswick Drywall Limited**, Respondents.

Jurisdictional Dispute – Relevance of international agreements between unions and decisions of other tribunals to Board's determinations – Long practice of Bricklayers performing drywall taping work in Kingston area – Board not disturbing established area practice

BEFORE: M. G. Picher, Vice-Chairman, and Board Members J. Wilson and H. Kobryn.

APPEARANCES: *Lewis Gottheil and Mike Quesnel for the applicant; Laurence C. Arnold and Aranado Collafracchesci for the respondent unions.*

DECISION OF THE BOARD; August 17, 1982

1. This is a jurisdictional dispute complaint filed pursuant to section 91 of the *Labour Relations Act*. The complainant (hereinafter "the Bricklayers") requests, among other things, a declaration that drywall taping in relation to the construction of a shopping mall known as the Catarqui Town Centre, at the intersection of Highway 2 and Highway 38 in the County of Frontenac, is within its exclusive trade jurisdiction. The application for a declaration is opposed by The International Brotherhood of Painters and Allied Trades and its local 1891 (hereinafter "the Painters").

2. The facts are not in dispute. Brunswick Drywall Limited is a New Brunswick based company specializing in the supply and installation of drywall. It apparently has a contractual relationship with the Robert Simpson Co. Ltd., whereby it does the installation of drywall in the renovation and the new construction of Simpson's department stores. Brunswick Drywall, in turn, has a collective agreement with the Painters, having signed a voluntary recognition agreement tying it into the Painter's provincial collective agreement on December 29, 1980. Brunswick commenced operations in Ontario at or about that time.

3. In January of 1982, in anticipation of work to be performed at the Catarqui Town Centre, Brunswick was approached by the Bricklayers concerning the assignments of drywall

taping on the Simpson's phase of the mall. The general contractor of the project, Jackson Lewis Co. Ltd. is party to a collective agreement with the Bricklayers, Article 1 of which forbids the subcontracting of work to employers who are not bound by the Bricklayers' provincial agreement. Apparently on the instruction of the general contractor Brunswick agreed to employ Bricklayers, and it is common ground that the drywall taping was being and is being performed by the Bricklayers, with the exception of one employee, a Painter, who worked on the project on the basis of a permit fee paid to the Bricklayers. With that accomodation reached, the Bricklayers did not insist on their collective agreement being signed by Brunswick, and no collective agreement was entered into.

4. It is also common ground that Brunswick has operated in Ontario only since late 1980 and that it has, with the exception of the Cataraqui project, exclusively employed members of the Painters local 1891 in drywall taping. The constitutional jurisdiction of local 1891 is province wide. The jurisdiction of local 10, on the other hand, is restricted to eastern Ontario, and more particularly the Kingston area. It extends roughly from Brockville to Napanee, being described in the Bricklayers constitution as follows:

Local Union No. 10 — Kingston

The Counties of Lennox and Addington, except the Township of Richmond, the County of Frontenac, the Township of Leeds in the County of Leeds, the Township of Front of Escott, Front of Yonge, and Elizabethtown in the County of Leeds and the Township of Augusta in the County of Grenville.

5. The Painters responded to the assignment of work by Brunswick to the Bricklayers by a letter to the employer dated January 25, 1982. It asserted that any such assignment was contrary to the collective agreement obligations of Brunswick Drywall Ltd.

6. A jurisdictional conflict between the Bricklayers and the Painters also flared up in relation to drywall taping to be performed on the same project for another subcontractor, Ottawa G.S.B. Construction Company. That led to an application before the Board and resulted in an interim order, dated January 19, 1982, directing the assignment of work to the Bricklayers, (Board File No. 2148-81-JD).

7. The delineation of work jurisdiction in respect of drywall taping has been reviewed in previous Board decisions. In a section 89 complaint filed originally in relation to the instant dispute (Board File No. 2576-81-U, dated May 20, 1982, unreported) the Board concluded that the issue was in essence jurisdictional, rather than an unfair labour practice. In so doing it observed:

3. Prior to the mid-1960's most interior walls were constructed of metal lath to which were applied two coats of plaster. However, since that time drywall has come to largely replace lath and plaster. Once in place, drywall can be joined with either plaster or tape, with tape being by far the more popular method. Having regard to the nature of the process, it is perhaps not surprising that very early in the use of drywall a jurisdictional rivalry over the taping work developed between the Painters' union and certain other unions, most notably the Operative

Plasterers and Cement Masons International Association (“the Plasterers’ union”). We believe we can take notice of the fact that in many, but not all, areas of the province, it has become the accepted practice to assign drywall taping work to members of the Painters’ union.

4. Although the rivalry for drywall taping work primarily involved the Painters’ and Plasterers’ unions, in certain counties in Eastern Ontario the work has been performed by members of the International Union of Bricklayers and Allied Craftsmen (“the Bricklayers’ union”). The involvement of the Bricklayers’ union arises out of the fact that the union has traditionally represented a number of plasterers, to the extent of operating local hiring halls for plasterers. The Bricklayers’ provincial agreement purports to claim taping work as part of the jurisdiction of plasterers who belong to the union. We believe we can take notice of the fact that the Bricklayers’ union has been particularly active in the drywall taping field in the Kingston area. Indeed, at the hearing, the representative of the Bricklayers’ union claimed that in the Kingston area the prevailing practice is to assign drywall taping work to members of the Bricklayers’ union.

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7. We are satisfied that this matter arises from the fact that Brunswick has assigned drywall taping work to members of the Bricklayers’ union rather than to members of the Painters’ union. Given the fact that the job is in the Kingston area, there is nothing in the assignment itself which might indicate to us that Brunswick was acting out of anti-union considerations or out of an attempt to deny that it is bound to the Painters’ provincial agreement. Rather, the issue appears to be whether Brunswick, in the Kingston area, is bound to honour the jurisdictional claim of the Painters’ union to drywall taping work, a claim which is supported by the provisions of the Painters’ provincial agreement. In our view, this is a matter which should not be dealt with on the basis of an alleged violation of the *Labour Relations Act*, but rather either under the work assignment dispute mechanism set out in section 91 of the Act or, arguably, as an alleged violation of the Painters’ provincial agreement. In this regard, we note that a Board direction under section 91 overrides the provisions of a collective agreement.

8. In the instant case the parties do not advance skill and ability or efficiency as a basis to distinguish between their respective jurisdictional claims. They rely in part on the collective bargaining relationships and, more substantially, on area practice.

9. Counsel for the Painters also relies on a number of other elements. Principally he stresses the anomalous nature of the jurisdictional claim to drywall taping advanced by local 10 of the Bricklayers. It is common ground that the Bricklayers do not assert jurisdiction over drywall taping in any area of Ontario other than in the Kingston area serviced by Local 10. He submits that the references to drywall taping in the Bricklayers’ collective agreement appear as a brief afterthought and that the Bricklayers’ constitution does not make specific reference to drywall taping. He views the claim of the Bricklayers based on a reference in the Constitution

of the Ontario Provincial Conference to “substitutes” in the plastering section of its trade jurisdiction article as strained and artificial as applied to drywall taping.

10. In support of his argument that the Bricklayers have relinquished any claim to drywall taping, counsel for the Painters adduced in evidence an agreement made between the internationals of the Bricklayers and the Painters dated November 29, 1961. By the terms of that understanding it was apparently resolved that the taping of drywall surfaces would be in the exclusive jurisdiction of the Painters. Reference was also made to a decision of the Impartial Jurisdictional Disputes Board in Washington D.C. On March 1, 1978 that Board issued a decision confirming the jurisdiction of the Painters over the painting and taping of drywall surfaces.

11. Agreements made internationally between unions are a factor that the Board may consider in the hearing of a jurisdictional dispute. So are the determinations of other tribunals. These are factors, however, which cannot be automatically determinative; they must be weighed in relation to all other factors, including considerations of provincial and area practice. Agreements and rulings made elsewhere do not necessarily reflect the labour relations realities in Ontario nor necessarily point the way to industrial peace and stability in the construction industry in this province. Problems particular to this province or parts of it must be considered on their own merits, with a view to fashioning jurisdictional orders that will minimize trade disputes and promote industrial peace in Ontario.

12. In the instant case area practice is of considerable significance. The evidence establishes that with a few minor exceptions that are not material, for many years the Bricklayers have performed drywall taping almost exclusively in the Kingston area, including Board area 29. It appears beyond contradiction that some eighty percent of the drywall installation in the area is performed by two contractors, Kingston Lath and Plaster Ltd. and Bertoia Lathing Ltd. Each of them has used the Bricklayers exclusively in drywall taping, having collective agreement relationships extending back to 1963 and 1974 respectively. While it appears that some non-union drywall work has been done in recent years in the ICI sector in Kingston, there is no evidence of any other union having done such work. While it is true, as counsel for the Painters points out, that the two contractors who dominate the drywall trade in Kingston are not large entrepreneurs, the evidence of his own witnesses confirms that in areas like Kingston such work is generally done by small local contractors. In these circumstances we do not see the size of the contractors as diminishing the weight to be given to the Bricklayers claim in respect of local area practice.

13. The evidence confirms that drywall taping has been done efficiently and virtually without challenge by the Bricklayers in the Kingston area for years. There seems to the Board to be little reason to disturb what appears to be a successful and long lived work jurisdiction the exercise of which has caused no industrial unrest. Counsel for the Painters suggested that a decision favouring the Bricklayers could produce a negative result in the form of a backlash against the Bricklayers if they should work, as they have on occasion, for Kingston Lath and Plaster Ltd. and Bertoia in the Belleville area. In this regard the Board is impressed by the undertaking given in evidence by Mr. Quesnel on behalf of the Bricklayers. He categorically stated that Local 10 does not seek to expand its territorial jurisdiction to Belleville or to other communities outside its present constitutional jurisdiction. In the light of that assertion, which the Board includes in this decision as a matter of record, the likelihood of future disputes seems unlikely.

14. We are agreed, however, with counsel for the Painters that the remedy in this complaint should be limited to the job location that gave rise to the dispute. While this decision should not be of any less value to the parties in the future, we do not see any reason to depart from the Board's general practice of confining the remedy in a jurisdictional dispute to the work immediately in issue.

15. For the foregoing reasons the Board hereby confirms the assignment of the work in dispute, being drywall taping, which includes the taping and jointing of all points, nail holes, and bruises on drywall and wallboard, through the use of tape and gypsum compound, by Brunswick Drywall Limited at the Cataraqui Town Centre to the International Union of Bricklayers and Allied Craftsmen and its Local 10.

2658-81-R Ron McKibbin, and others, Applicants, v. United Brotherhood of Carpenters and Joiners of America, Respondent, v. Clarence H. Graham Construction Limited, Intervener

Construction Industry – Termination – Termination application pertaining to ICI bargaining unit – Whether in excess of 45 percent of all employees covered by provincial agreement must signify desire to terminate – Board holding bargaining unit means unit of individual employer

BEFORE: Rory F. Egan, Vice-Chairman, and Board Members W. G. Donnelly and A. HersHKovitz.

APPEARANCES: *Michael Gordon and John H. E. Middlebro for the applicants; Douglas J. Wray and Bryon Black for the respondent; Brian P. Smeenk and Richard Graham for the intervener.*

DECISION OF RORY F. EGAN, VICE-CHAIRMAN AND BOARD MEMBER W. G. DONNELLY; August 9, 1982

1. This is an application brought under the provisions of section 57 of the *Labour Relations Act* for a declaration terminating bargaining rights.

2. Sections 57(1), (2) and (3) are as follows:

57.1(1) If a trade union does not make a collective agreement with the employer within one year after its certification, any of the employees in the bargaining unit determined in the certificate may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit.

(2) Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit.

- (a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation;
- (b) in the case of a collective agreement for a term of more than three years, only after the commencement of the thirty-fifth month of its operation and before the commencement of the thirty-seventh month of its operation and during the two-month period immediately preceding the end of each year that the agreement continues to operate thereafter or after the commencement of the last two months of its operation, as the case may be;
- (c) in the case of a collective agreement referred to in clause (a) or (b) that provides that it will continue to operate for any further term or successive terms if either party fails to give to the other notice to bargain with a view to the renewal, with or without modifications, of the agreement or to the making of a new agreement, only during the last two months of each year that it so continues to operate or after the commencement of the last two months of its operation, as the case may be.

(3) Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as is determined under clause 103(2)(j) that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

3. The applicants seek the declaration with respect to two bargaining units or employees of the intervener.

4. On February 3, 1982, the respondent was granted two certificates by the Board. One certificate describes a bargaining unit comprising all carpenters and carpenters' apprentices in the employ of Clarence H. Graham Construction Limited in the industrial, commercial and institutional sector of the construction industry, in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

5. The other certificate describes a bargaining unit comprising all carpenters and carpenters' apprentices in the employ of Clarence H. Graham Construction Limited in the County of Grey, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

6. Both certificates were issued on February 3, 1982. The application for the declaration was filed on March 23, 1982. The document filed in support of the application does not differentiate between the two bargaining units. It bears the signature of 5 employees of the intervener.

7. The Board confirms its decision made at the hearing that the application for a declaration terminating bargaining rights with respect to the bargaining unit comprising all carpenters and carpenters' apprentices in the employ of Clarence H. Graham Construction Limited in the County of Grey, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman, is untimely, having regard to the provisions of section 57(1) and section 123(1). The application with respect to that bargaining unit, (the non-I.C.I. sector) is accordingly dismissed.

8. The Board now proceeds to consider the application with respect to the I.C.I. bargaining unit.

9. The respondent argues that the application falls within the provisions of section 57(2) of the Act.

10. It is not disputed that by virtue of section 145(4) of the Act the company and its employees, after certification, became bound by the provisions of the provincial agreement acknowledged by all parties to have been in force at the date of certification. The agreement was in the last two months of its operation when the application was made so that no question of timeliness is involved.

11. The respondent takes the position that the bargaining unit comprises all employees covered by the provincial agreement and that the applicant has therefore not met the requirement of section 57(3) that an application have the voluntary support of not less than 45% of the employees in the bargaining unit. The application was supported by 5 employees, whereas the provincial agreement covers thousands of employees. The respondent's position is that the bargaining unit "determined in the certificate" has lost all significance by reason of the operations of section 145(4) and that the bargaining unit for the purposes of section 57(3) is, accordingly, a province-wide bargaining unit.

12. The respondent union made reference to various sections of the Act where the term "provincial unit" and province-wide bargaining are used, and submitted that these gave support to its contention that the bargaining unit for the purposes of termination must be a province-wide unit in the sense that it must include all employees to whom the province-wide agreement applies. Some of the sections are as follows:

- (a) Section 137(1)(b) states that "bargaining" in sections 138 to 151 which deal with province-wide bargaining, means province-wide, multi-employer bargaining. There is, however, no reference to bargaining units in that definition. Subsection (e) defines a "provincial agreement" as an agreement in writing covering the whole Province of Ontario between representatives of employers and a designated or certified employee bargaining agency. It does not make reference to a bargaining unit.
- (b) Section 139(a) speaks of provincial units of affiliated bargaining agents and (b) speaks of provincial units of employers.
- (c) Section 140 deals with "a provincial unit of affiliated bargaining

agents”, and section 142 with “a provincial unit of affiliated bargaining agents”.

There is no reference, however, to a provincial bargaining unit of employees in these sections, and none can be inferred from the language used throughout the Province-Wide Bargaining sections of the Act.

13. The applicant submitted that the principle set out in section 3 of the Act to the effect that every person is free to join the trade union of his choice has a corollary that ensures freedom to terminate a relationship with a trade union. It further argues that in the absence of provisions for termination under the construction industry sections the terms of sections 57(2) and (3) state that the unit must be, for the purposes of termination, one composed of the employees of the employer named in the certification, that is, all carpenters and carpenters' apprentices employed by Clarence H. Graham Construction Limited in the Province of Ontario. Clarence H. Graham Construction Limited argued that the bargaining unit proposed by the applicant was the proper one and relied upon the decision of the Board in the *Jan Peters Ltd.* case, [1980] OLRB Rep. May 714.

14. The union in the present case was certified for a bargaining unit made up of employees of the particular employer, Clarence H. Graham Construction Limited, wherever they may be found in the province. These employees are then automatically covered by the province-wide collective agreement, that is, by a collective agreement that is applicable to Graham Construction employees and to other employees of other employers throughout the province. The employer at the time of certification remains the employer throughout and his employees at the time of certification remain his employees throughout. There is, accordingly, no such thing as a homogeneous provincial bargaining unit, but only a conglomeration of individual bargaining units to whom the terms of the provincial collective agreement apply.

15. The collective bargaining agent is there for the purpose of bargaining only (sections 137(2) and 142). The fact that no individual group may strike (section 148) flows not from any concept of a homogeneous bargaining unit but from the fact that a strike or a lockout is a part of the collective bargaining process and that function, that is, collective bargaining, is reserved to the employee bargaining agency. Termination proceedings are not part of the bargaining process and do not fall within the provincial bargaining area. Just as certification can be obtained by a group of employees of an employer notwithstanding the fact that they do not embrace all carpenters (or whatever trade) in the province, so a group of employees must be able to apply for termination of bargaining rights for the employees of their own employer, although again they do not represent all the carpenters in the provincial unit.

16. Support for these views may be found in the case of *Jan Peters Ltd.*, *supra*. There the Board dealt with an application for termination of bargaining rights of employees in both sectors where a local agreement and a provincial agreement were in effect. The application with respect to the local agreement was found to be untimely, whereas it was found to be timely insofar as the provincial agreement was concerned. The same situation exists in the present case.

17. The Board in the *Jan Peters Ltd.* case dealt with the questions of the correct bargaining unit for the purposes of termination. The bargaining unit had been described as covering the Counties of Waterloo and Wellington and the Board, citing section 125(2) [now 137(2)] of the Act, had the following to say, at page 716:

The effect of this provision is to extend by operation of law recognition of the respondent trade union from the Counties of Waterloo and Wellington to the whole of the Province of Ontario, that is, the geographic jurisdiction of Local 793, but only for bargaining rights in the industrial, commercial and institutional sector of the construction industry. Since the bargaining unit in the provincial agreement affecting the employer in this case has been modified by operation of law, we are of the view that the correct bargaining unit for termination purposes in this application is the bargaining unit as amended by section 125(2). To suggest otherwise would lead to an untenable position. On May 1st the bargaining rights of the respondent became province-wide for the industrial, commercial and institutional sector of the construction industry. If this Board were to terminate bargaining rights for the Counties of Waterloo and Wellington, the bargaining rights would continue to exist for the remainder of the province and then the new subsection 2 of section 125 would deem those bargaining rights to extend recognition back into the Counties of Waterloo and Wellington.

18. The Board then went on to direct a vote. It declared that those eligible to vote were all employees in the industrial, commercial and institutional sector engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the maintaining and repairing of such equipment in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

19. The precise question of the effect of sections 57(2) and (3) on employees' rights with respect to termination where a provincial agreement subsists was not raised in the *Peters* case. However, the Board did find the "correct" bargaining unit in termination cases under a provincial agreement. It is the employees in that bargaining unit, however vaguely described in the provincial agreement, who are entitled to make an application for termination of bargaining rights under sections 57(2) and (3) of the Act.

20. We accordingly find that the correct bargaining unit for the purposes of termination in the present instance comprises all carpenters and carpenters' apprentices in the employ of Clarence H. Graham Construction Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

21. The Board is satisfied on all the evidence before it that not less than forty-five per cent of the employees of Clarence H. Graham Construction Limited in the bargaining unit at the time the application was made have voluntarily signified in writing that they no longer wish to be represented by the respondent trade union as of April 2, 1982, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of making such determination.

22. The Board accordingly directs that a representation vote be taken of the employees of Clarence H. Graham Construction Limited. Those eligible to vote are all employees employed in the correct bargaining unit described above on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

23. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with Clarence H. Graham Construction Limited.

24. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER A. HERSHKOVITZ;

The decision of A. Hershkovitz will follow.

2694-81-R Labourers' International Union of North America, Local 837, Applicant, v. **Cooper Construction Company Limited**, Respondent, v. Operative Plasterers and Cement Masons International Association, Local 598, Intervener.

Employee – Practice and Procedure – Pre-Hearing Vote – Individual hired contrary to collective agreement – Not considered employee for purposes of count or vote – Whether right to challenge eligibility waived by conduct

BEFORE: N. B. Satterfield, Vice-Chairman, and Board Members J. Wilson and H. Kobryn.

APPEARANCES: *B. Fishbein and D. McGregor for the applicant; Fred B. Reaume for the respondent; Giovanni Balanzin and John Marc mildon for the intervener.*

DECISION OF THE BOARD; August 4, 1982

1. This is an application for certification in which the Board, differently constituted, directed that a pre-hearing representation vote be held. Prior to that decision issuing, there had been a meeting between the parties to the application and a Board Officer, as is customary when the applicant has requested that a pre-hearing representation vote be held. The Board's record reveals that each of the three parties was represented at the meeting either by an agent or legal counsel, and in the case of the applicant it was represented by counsel. The record also reveals that the parties were not in agreement on two matters. These were whether the bargaining unit sought by the applicant was an appropriate one, and whether Angelo Lovalente was eligible to vote. The persons affected by the application would be the same regardless of which of the three unit descriptions proposed by the parties was adopted. Lovalente's eligibility to vote was challenged by the intervener on the grounds that he was not a member of the intervener. These issues caused the Board to direct that Lovalente be allowed to cast a segregated ballot, that the ballot box be sealed following the taking of the vote and that the Registrar list the application for hearing following the conduct of the vote. The purpose of the hearing was to receive "... the evidence and representations of the parties with respect to all matters arising out of and incidental to these applications."

2. The vote was held as directed and following the balloting, the Returning Officer issued his report to the parties in Form 72, "Notice of Report of Returning Officer Where

Board Has Directed That Ballot Box Be Sealed". That form contains, *inter alia*, the following directions to the parties:

3. TAKE NOTICE that if you desire to make representations,
 - (a) as to any matter relating to the representation vote; or
 - (b) (where a pre-hearing representation vote has been held) in connection with the application;

you shall send to the Board a statement of desire to make representations which shall,

- i. be in writing and signed by the persons making the statement or his representative,
- ii. contain the names of the parties to the application,
- iii. contain a return mailing address, and
- iv. contain a statement as to whether you desire a hearing before the Board.

Your statement of desire must contain a summary of the representations you wish the Board to consider.

4. A statement referred to in paragraph 3 shall be sent to the Board so that,

- (a) it is received by the Board; or
- (b) if it is mailed by registered mail addressed to the Board at its office, 400 University Ave., Toronto, Ontario, M7A 1V4, it is mailed; not later than the 29th day of APRIL, 1982.

*5. IF NO STATEMENT OF DESIRE TO MAKE REPRESENTATIONS IS SENT TO THE BOARD IN ACCORDANCE WITH PARAGRAPHS 3 AND 4, THE BOARD MAY DISPOSE OF THE APPLICATION UPON THE MATERIAL BEFORE IT ON ALL MATTERS EXCEPT AS TO THE RESULT OF THE VOTE WITHOUT FURTHER NOTICE TO THE PARTIES OR THE EMPLOYEES.

• • •

*If you do not request a hearing but wish the Board to consider your representations without a hearing, your statement of desire must contain all the representations you desire the Board to consider.

The applicant, through its solicitors, duly filed written representations containing the following statement:

On behalf of the Applicant, we submit that the appropriate bargaining unit is that set out in the Application for Certification. Further, we submit that all employees who cast ballots were properly in the bargaining unit and therefore entitled to vote. Accordingly, we submit that the ballot box be unsealed and the ballots counted forthwith so that the Application for Certification may be disposed of in accordance with the wishes of the subject employees.

Pursuant to the Board's original direction, formal Notice of Hearing (Form 8) was issued to the parties giving the purpose of the hearing as "hearing the evidence and representations of the parties with respect to all matters arising out of and incidental to these applications.". Subsequent to that notice issuing and prior to the hearing, solicitors for the applicant made further representations in writing as follows:

• • •

As no party, other than the Applicant, made representations after Notice of the Report of the Returning Officer, it appears that there are no issues other than the description of the bargaining unit.

Therefore the Applicant is prepared to adopt the bargaining unit description proposed by the Respondent and the Intervener, which we understand to be the bargaining unit as described in the existing Provincial Collective Agreement binding upon both the Respondent and the Intervener. Accordingly, as this is a displacement application for certification, the Applicant requests that the bargaining unit be amended to that proposed by the Respondent and the Intervener, namely:

"all working foremen, journeymen and apprentice cement masons and waterproofers in the employ of the Respondent in the industrial commercial and institutional sector of the construction industry in the province of Ontario".

There now appears to be no other issues with respect to this application for certification, and we request that the hearing scheduled for May 21, 1982 be cancelled and the ballot box be unsealed and the ballots counted forthwith.

3. Counsel for the applicant at the hearing raised the preliminary issue of whether the intervener was entitled to pursue its challenge of Lovalente's eligibility to vote, since the intervener had made no written representations to the Board either following the pre-hearing meeting with the Board Officer or following the issue of Form 72. The applicant contends that the intervener's failure to make such written representations, particularly with respect to the requirements of Form 72, that it has waived its right to a hearing on its challenge with respect to Lovalente. After hearing the representations of the parties on the preliminary issue, the Board reserved its decision and heard the evidence and representations of the parties on the two issues of voter eligibility and the appropriate bargaining unit. Before the Board can

determine those two issues on their merits, it first must decide the preliminary issue raised at the hearing by the applicant.

4. Applicant counsel contends that Form 72 expresses clear directions to be satisfied by any party seeking to make representations about the conduct of the vote or, in the case of a pre-hearing representation vote, as this was, about the application itself. Counsel also argues that it is up to the Board to enforce its Forms, Rules of Procedure, and directions made under the Act and its Regulations if it expects them to have any meaning. Furthermore, counsel contends that it is insufficient for a party which is seeking a hearing merely to raise an issue without specificity or particularity at a pre-hearing meeting, since the prime purpose of the meeting is to make arrangements for the vote.

5. This Board cannot agree with counsel on the purpose of the pre-hearing meeting. Board Officers appointed to enquire into pre-hearing applications are authorized:

- (1) to confer with the parties as to the description and composition of an appropriate bargaining unit;
- (2) to examine the records of the applicant and of the respondent for the purpose of obtaining the information required by the Board under subsection 2 of section 8 of the Labour Relations Act;
- (3) to confer with the parties as to the description and composition of the voting constituency, the list of employees as of the terminal date in this matter to be used for the purposes of any vote that may be directed by the Board, the form of the ballot, the date and hour for the taking of the vote, and the number and locations of the polling places;
- (4) upon consent of the parties to investigate any other matter relating to the application; and
- (5) to report to the Board.

The primary purpose of the meeting between the parties and the Board Officer is to obtain information which may allow the Board to determine a voting constituency and whether the applicant appears to have the requisite membership support to be entitled to a pre-hearing representation vote. A meeting may also serve to identify matters relative to the application on which the parties disagree and these are reported to the Board by the Officer. Typically these matters often involve issues about the appropriateness of the bargaining unit being sought, and the eligibility of persons to vote. They may also include issues of whether persons are employees for purposes of determining the applicant's membership support, charges relating to the reliability of the membership evidence and even status of the applicant as a trade union within the meaning of section 1(1)(p) of the Act.

6. The pre-hearing vote provisions in section 9 of the Act provide for a speedy test of the applicant's membership support without having to resolve such issues before that test can be taken. Such remaining issues can be resolved by a post-vote hearing. Depending on the nature of the issues, the Board may include in its vote direction decision, a direction that a hearing be held following the vote, as it did here, or it may await the outcome of the vote and

see if the parties file statements of desire and representations before directing that a hearing be held. The Board's experience is that the parties frequently withdraw challenges or settle the issues once the vote has been taken, particularly if the circumstances allow the counting of the ballots. In the instant case, there were only two persons on the list for the purpose of determining the applicant's membership support and on the list of eligible voters, one of whom had been challenged. The parties were also in disagreement with the bargaining unit proposed by the applicant and it appears that the Board considered these two issues sufficient to direct that a hearing be held without awaiting the holding of the ballot before making such direction.

7. The Board is no less concerned than applicant counsel with the need to enforce its rules, directions and forms, and in the appropriate circumstances the Board has consistently done so by refusing to hear an issue on which there has not been due notice to the parties or by restricting the scope of the evidence and representations where a stated issue has been lacking in specificity or particularity. In the case at hand, the parties were fully aware of the issues raised at the pre-hearing vote meeting with the Board officer, and they were fully aware of the Board's direction that a hearing be held. Since a hearing had already been directed, it was unnecessary for the intervener to make representations pursuant to Form 72 in order to be entitled to a hearing. That is not to say, however, that the intervener, having failed to make any written representations with respect to its challenge, was without any risk in having its challenge heard. It clearly ran the risk of being limited in the scope of the evidence which it could call in support of that challenge by its failure to set out its challenge in writing in more specific and particular terms. While the applicant cannot be said to have been caught by surprise by the challenge, it having been made at the pre-hearing meeting and the Board having directed that Lovalente's ballot be segregated, the applicant would have been entitled to request particulars of the challenge from the intervener. It did not.

8. The Board sees no prejudice to the applicant by allowing the intervener to pursue its challenge, having been made in a timely fashion. Were the Board to deny the intervener a hearing on the issue of Lovalente's eligibility to vote having directed a hearing for purposes which would include that issue, the intervener would be prejudiced. In all of these circumstances, the Board is not prepared to find that the intervener has waived its right to a hearing on the issue in question. The Board will determine that issue, therefore, on its merits.

9. In the course of hearing the evidence and representations of the parties, particularly those of the intervener, it became apparent that its challenge to Lovalente's eligibility to vote "because he was not a member of the intervener" was based on the allegation that Lovalente was at work in the bargaining unit on the date of application contrary to the provisions of the provincial agreement to which the intervener and respondent are bound. More specifically, the intervener alleges that Lovalente either was hired to work in the bargaining unit in violation of the agreement's hiring provision or was hired for work not within the scope of the intervener's bargaining unit and later was placed on that work contrary to the provisions of the provincial agreement. In either event, the intervener contends that, but for the alleged violation of the collective agreement, Lovalente would not have been at work in the bargaining unit on the date of the application.

10. The Board is satisfied on the evidence before it that, for at least five years prior to this application, the respondent employed only one person in the bargaining unit set out in the provincial agreement to which it and the intervener are bound. The Board is further satisfied that Article 3 of that agreement requires the employer to hire persons for work in that unit

through the intervener's hiring hall and that Lovalente was not hired pursuant to those provisions of the collective agreement. When the intervener became aware of Lovalente, it filed a grievance under section 124 of the Act against the respondent, but settled the grievance in its favour without the matter coming to a hearing before this Board. The Board finds on the evidence that Lovalente was employed in the bargaining unit on the date of this application contrary to the provisions of the collective agreement binding upon the intervener and the respondent.

11. The intervener argues that, because Lovalente was at work contrary to the provisions of the provincial agreement, he was not an employee at work in the bargaining unit for purposes of either the count or the vote. Since there were only two persons at work in the unit on the date of the application, if the board accepts the intervener's argument, there would be only one employee left in the unit. Section 6(1) of the Act requires that an appropriate unit consist of more than one employee. Therefore, there would be no appropriate unit and the application would be dismissed. In support of its argument, the intervener is relying on the Board's decision in *April Waterproofing Ltd.*, [1980] OLRB Rep. Nov. 1577. That was an application for certification in which another local of the Labourers' International Union of North America was also seeking to displace the incumbent herein as bargaining agent for the employees in question. There were four employees in the bargaining unit and the Board found that three of them had been employed in violation of the hiring provisions of the intervener's collective agreement. The Board in that case, while acknowledging that a common-law employee-employer relationship existed between the respondent and the three individuals, held that relationship not to be determinative of their status as bargaining unit employees. In this respect it stated:

"In our view, the bargaining unit is comprised of employees employed under the terms of the applicable collective agreement. To be so employed, an employee must have been hired in accordance with the provisions of the agreement. The three individuals in dispute were not hired in accordance with the provisions of the collective agreement and accordingly, in our view, they do not come within the bargaining unit covered by the collective agreement. This being so, we are satisfied that in ascertaining the numbers of employees in the bargaining unit for purposes of section 7(1) of the Act, the three individuals in dispute should not be taken into account."

12. Counsel for the applicant argues that, to the extent that the Board might find the *April Waterproofing* decision analogous to the circumstances of this case, the Board should not follow that decision because:

- (a) there is no authority for the decision in the specific language of the *Labour Relations Act*;
- (b) it is a policy decision which failed to take into account earlier decisions of the Board which counsel contends are in conflict with the *April Waterproofing* decision.

The Board disagrees with the proposition that it has no statutory authority for its decision in *April Waterproofing*, *supra*, that persons who had not been employed in accordance with the

applicable collective agreement were not employees in the bargaining unit for purposes of section 7(1) of the Act. That section mandates the Board to "... ascertain the number of employees in the bargaining at the time the application was made. ...". Section 106(1) gives the Board the "... exclusive jurisdiction ... to determine all questions of fact ... that arise in any matter before it, ...". The determination of whether the persons challenged were employees in the bargaining unit in question was a factual determination essential to ascertaining the number of employees in the bargaining unit at the time the application was made. Therefore the Board was clearly acting within its jurisdiction when it decided the status of the challenged employees in *April Waterproofing*.

13. The decisions referred to in item (b) above are the Board's decisions in *Master Insulation Company Limited*, [1980] OLRB Rep. Feb. 242; *Master Insulation Company Limited*, [1980] OLRB Rep. May 744; and *Kilgoran Hotels Limited carrying on business as Ye Olde Brunswick Tavern*, [1975] OLRB Rep. May 431. With all due respect to counsel, the Board does not see a conflict between the *April Waterproofing* decision and the three decisions on which counsel is relying. The Board did not have to decide in any of those three cases whether certain persons whose eligibility to vote had been challenged were employed in the bargaining unit contrary to the provisions of the relevant collective agreement. It follows, therefore, that neither did the Board have to decide whether persons hired contrary to the provisions of a collective agreement were employees in the bargaining unit for purposes of determining voter eligibility. In the *April Waterproofing* decision, those were precisely the issues before the Board and the issues which it determined.

14. The Board considers the circumstances in the *April Waterproofing* decision to be quite analogous to those in the instant application and, therefore, having found that Angelo Lovalente was at work in the bargaining unit on the date of the application contrary to the provisions of the collective agreement to which the intervener and respondent are bound, the Board further finds that he was not an employee in the bargaining unit for purposes of section 7(1) of the *Labour Relations Act*. Accordingly, there is only one person who is an employee for purposes of that section and, pursuant to section 6(1) of the Act, there is no unit of employees that is appropriate for collective bargaining.

15. This application, therefore, is dismissed. In view of this result, it is unnecessary for the Board to determine the other issues with respect to the appropriate bargaining unit which were before it.

16. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.

2535-81-R Labourers' International Union of North America, Applicant, v. **Diplock Durable Floor Company Limited**, Respondent, v. Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union No. 598, Intervener.

Construction Industry – Pre-Hearing Vote – Practice and Procedure – Long term employees not at work on terminal date – Whether eligible to vote – Eligibility policy in construction industry

BEFORE: Ian Springate, Vice-Chairman, and Board Members W. H. Wightman and C. A. Ballentine.

APPEARANCES: *Ian Roland and Peter Hitchen for the applicant; W. James Stuckey for the respondent; L. C. Arnold and G. Balanzin for the intervener.*

DECISION OF THE BOARD; August 18, 1982

1. This is an application for certification. The respondent is an employer engaged in the construction industry.

2. The intervener is currently the bargaining agent for certain employees of the respondent. By way of this application the applicant is seeking to acquire the bargaining rights for these employees.

3. In a decision dated March 29, 1982, a differently constituted panel of the Board determined a voting constituency and directed the taking of a pre-hearing representation vote. In accordance with the Board's general practice in such matters, the Board stipulated that those eligible to vote were employees in the voting constituency on March 16, 1982, the terminal date fixed for the application, who had not voluntarily terminated their employment or who had not been discharged for cause between March 16, 1982 and the date the vote was taken.

4. Subsequent to the release of the Board's decision, the parties reached agreement on a voters' list containing six names. The parties also specifically agreed that eight persons who had at various times worked for the respondent should not be included on the list in that they had not been working for the respondent on March 16, 1982. It appears that at this time the intervener contended that an additional name should be added to the list, namely that of Mr. L. Mastromarco. The other parties did not agree to adding Mr. Mastromarco's name to the list due to their understanding that he exercised managerial functions on behalf of the respondent.

5. The pre-hearing representation vote was held on April 6, 1982. Five of the six employees listed on the agreed-upon voters' list cast ballots. Six additional persons also presented themselves at the poll, and each was permitted to vote by way of a segregated ballot. One of these persons was Mr. Mastromarco. The other five individuals were among the eight whom the parties had agreed should not be included on the voters' list in that they had not been working for the respondent on March 16, 1982. At the conclusion of the balloting, the ballot box was sealed. To date none of the ballots have been counted.

6. The Board listed this matter for hearing with respect to the issue of whether or not the segregated ballots should be counted. The Board notes the agreement of the parties to having this panel deal with the issue. At the hearing the intervener contended that although it had earlier agreed that five of the individuals who cast segregated ballots were properly excluded from the voters list, nevertheless in that the individuals had presented themselves at the poll, the Board should inquire into the matter. The intervener further contended that the Board should count their ballots. The applicant objected to this approach contending (although no evidence was led to support the contention) that the intervener had encouraged its supporters who were not on the agreed voters' list to show up at the vote. The applicant submitted that it would be unfair to now count the ballots of these individuals in that had the applicant been aware that the Board would do so, the applicant would have advised its supporters who were not on the voters' list to also attend at the poll. Having regard to our conclusion set out below, there is no need in this case to deal with the propriety of the intervener agreeing that certain individuals were not entitled to vote, and later contending that segregated ballots cast by these same individuals should be counted.

7. We turn first to consider the eligibility to vote of Mr. Mastromarco. The parties reached agreement on certain facts relevant to Mr. Mastromarco's duties. These facts indicate that at the relevant time Mr. Mastromarco was employed by the respondent as its field superintendent with the power to hire and fire employees. This being the case, we are satisfied that on March 16, 1982 Mr. Mastromarco was a person who exercised managerial functions and hence, pursuant to section 1(3)(b) of the Act, was not an employee for the purposes of the Act. This being the case, Mr. Mastromarco's segregated ballot is not to be counted.

8. The other five individuals who cast segregated ballots have each had a long connection with the respondent. However, for various reasons they were not actually working for the respondent on March 16, 1982. Two of them, namely Mr. J. White and Mr. A. Fritas, had been formally laid off by the respondent for most of the month of March, although they were subsequently recalled on April 5, 1982. Two others, namely Mr. D. Gomes and Mr. J. Iwasjuk worked for the respondent during most of March, but due to a lack of work they had been advised not to report on a number of days during the month, including March 16, 1982. Both men subsequently returned to work for the respondent. The final individual, Mr. G. White, was away most of the month of March on vacation. The intervener takes the position that given their ongoing involvement with the respondent, the five individuals should be regarded as employees of the respondent and their ballots counted notwithstanding the fact that they were not actually at work on March 16, 1982.

9. Unlike the situation in other industries, the Board's general practice in the construction industry is to count as employees of an employer only those persons actually at work for the employer on the day in question. This applies both when the Board determines who was an employee on the application date for the purposes of the "count", and also who was an employee on the date set to determine eligibility to vote in a representation vote. The Board's practice arises out of the transient nature of the work force in the construction industry as well as a resulting need for a clear set of practices regarding construction industry certification applications. Individual tradesmen frequently move from employer to employer. Further, when a tradesman is laid off, even for a short period of time, he often obtains alternate employment with another firm. In this regard, it is instructive to note that one of the individuals who worked for the respondent during most of March, namely Mr. Gomes, was included on the voters' list in the *Metro Concrete Floors Inc.* case, File No. 2657-81-R (which

involved a contest between the same two unions as in this case) on the basis of his employment by that firm during part of March, including March 31, 1982, the date set to determine voter eligibility.

10. Counsel for the intervener contended that the Board sometimes takes a wider view concerning who is a construction industry employee, and in this regard relied primarily on the Board's decision in *J. McLeod & Sons Ltd.* case, [1969] OLRB Rep. Dec. 1100. In that case the Board concluded that a number of striking construction tradesmen were "employees" and hence entitled to vote in a displacement certification application. We do not regard the reasoning in the *McLeod* case to be applicable in these proceedings. In the *McLeod* case the Board appears to have concluded that at the relevant time the striking tradesmen would actually have been at work for the employer except only for the fact that they were on strike. In light of section 1(2) of the *Labour Relations Act*, which stipulates that no person shall be deemed to have ceased to be an employee by reason only of his ceasing to work for an employer as a result of a strike, the Board went on to conclude that the tradesmen remained employees of the employer. In the instant case, however, section 1(2) has no application.

11. We are not prepared to depart from the Board's practice of regarding as employees in the construction industry only those persons actually at work for an employer on the date in question. We would note that the policy is one that avoids uncertainty and lengthy disputes concerning who should be counted as an employee. In this regard, we would adopt the reasoning of the Board in the *Keystone Constructors Limited* case, [1966] OLRB Rep. Feb. 821, where in denying a request that it not dismiss a construction industry certification application due to the fact that no one was at work on the application date because of a snow storm, the Board noted that its policy respecting who it will view as a construction industry employee is basically equitable to all parties and also lends itself to the expeditious disposition of certification applications which is a primary consideration in the construction industry. In the instant case, the Board set March 16, 1982 as the date for determining voter eligibility. In that the five individuals in question did not work for the respondent on March 16, 1982, we are satisfied that on that date they were not employed within the voting constituency. Accordingly, the segregated ballots of Messrs. Iwasjuk, Gomes, Fritas, G. Whie and J. White are not to be counted.

12. The Board directs that the five non-segregated ballots cast in the pre-hearing representation vote now be counted. The matter is referred to the Registrar.

0314-82-R Joseph Appleman, Applicant, v. Shopmen's Local Union No. 834 of the International Association of Bridge, Structural and Ornamental Iron Workers, Respondent, v. **Empco-Fab Ltd.**, Intervener

Petition – Termination – Applicant sponsor of previous petition – Employer paying legal fees incurred for petition – Payment not pre-arranged – Employees having knowledge of payment by employer – Subsequent termination petition by applicant tainted

BEFORE: M. G. Picher, Vice-Chairman, and Board Members J. A. Ronson and W. F. Rutherford

APPEARANCES: J. P. Wearing, J. Appleman and E. Rhoden for the applicant; M. Zigler and S. Perri for the respondent; C. E. Humphrey, E. Wunsche and C. Myers for the intervener.

DECISION OF M. G. PICHER, VICE-CHAIRMAN AND BOARD MEMBER W. F. RUTHERFORD; August 17, 1982

1. This is an application for the termination of bargaining rights under section 57(1) of the *Labour Relations Act*. It raises, apparently for the first time, the special problems of a petition sponsored by an employee on whose behalf of the employer had paid legal fees for a similar petition in the past.

2. The applicant, Joseph Appleman, gave evidence of the circumstances surrounding the origination and circulation of the petition which he sponsored in support of this application. There are seven employees in the bargaining unit. Five of them signed Mr. Appleman's petition, all in the parking lot of the employer's premises after work, at or about 3:30 p.m. on May 10, 1982. There is nothing unusual or irregular about the circumstances of the petition save Mr. Appleman's involvement in a similar petition in a previous application before the Board.

3. The evidence establishes that Mr. Appleman previously sponsored a petition against another union at the time of its attempted certification. The applicant was then the United Steelworkers of America (Board File No. 0072-80-R). At that time Mr. Appleman was represented before the Board by Mr. Michael Gordon of the Toronto law firm of Beard, Winter, Gordon, the firm which represents him in the instant application. It appears from the record in the earlier Board file that Mr. Appleman was the only witness heard on the petition. The Board conducted its normal inquiry to satisfy itself that the petition was not management inspired or supported and that it was voluntarily signed by the employees. In its decision dated May 14, 1980, the panel, composed of chairman Adams and members Bell and Rutherford, noted that it was satisfied with the evidence relating to the origination and circulation of the petition. It therefore ordered the taking of a representation vote, notwithstanding that more than 55 per cent of the employees in the bargaining unit were members of the applicant union on the terminal date.

4. The Board accepted Mr. Appleman's evidence and ordered a vote. The union lost the vote, and on November 21, 1980 the panel dismissed the application and imposed a six month bar against any further application by the Steelworkers. Shortly thereafter Mr. Appleman received Mr. Gordon's account. He apparently did not attempt to pay it himself or seek contributions from his fellow employees. Rather, by his own admission in cross-

examination, he took Mr. Gordon's account to the Secretary Treasurer of the company, Mrs. Cynthia Myers. The record shows that Mrs. Myers had appeared as a representative of the company at the certification hearing which heard Mr. Appleman's petition. According to Mr. Appleman's evidence Mrs. Myers told him that she would take care of Mr. Gordon's account, and it was then paid directly by the company.

5. The Board can have no doubt that the company underwrote the legal services that led to the dismissal of the Steelworkers' application in 1980. Mr. Edgar Wunsche, president of the employer, was called as a witness, principally to give evidence respecting a meeting with employees. When asked whether he had knowledge of the company having paid for the legal services of the petitioning employees in the Steelworkers application Mr. Wunsche stated:

I don't know. It is possible the company paid Mr. Gordon's account. I don't sign every cheque.

Mrs. Myers, who was again present at the hearing as a representative of the employer was not called to testify. In these circumstances the inference that the employer paid Mr. Gordon's account is irresistible. We find that it did. It should be noted that counsel for both Mr. Appleman and counsel for the respondent subsequently made no attempt to advance argument on any basis other than the company having directly paid Mr. Gordon for his services rendered to Mr. Appleman in the previous certification application. It should be stressed, however, that there is no evidence or suggestion before the Board that the payment was prearranged. The evidence before the Board is entirely to the contrary.

6. It apparently became known among the employees that Mr. Gordon's services in the Steelworkers' application had been paid for by the company. Mr. Appleman confirmed that the employee who had shared the cost of the initial \$50.00 retainer paid to Mr. Gordon was aware that the company had paid the balance of the account. At one point in his evidence he stated:

I may have told other employees that the employer paid for the legal fees. I really don't remember how many I would have told.

When asked later whether the long term employees who were in the bargaining unit both then and now would know about it he stated:

None of them know the company paid. I don't think I'd have told them.

7. In light of that evidence, and particularly in light of the fact that counsel for the union had sufficient sources of information to cross-examine Mr. Appleman rather authoritatively on the issue of the prior payment of the legal fee, we must conclude that employee knowledge that Mr. Appleman's legal account in the Steelworkers case was paid by the company is more widespread than Mr. Appleman is prepared to concede. Information of that kind, once released in a workplace, is seldom contained. We are satisfied, on the balance of probabilities, that employee knowledge of the company's payment extended beyond Mr. Appleman and the one employee he can recall telling. Without necessarily concluding that the payment of Mr. Gordon by the company was common knowledge among the employees, it is a cause of concern that the extent of employee knowledge in this area is indeterminate.

8. It is against that background that the evidence in this application is to be assessed. Before turning to the merits of the petition in the instant case, however, the Board feels compelled to comment on the evidence before it to this point, if only because counsel for Mr. Appleman seemed not to appreciate the seriousness of what has been disclosed. He submits that there was no impropriety in Mr. Appleman submitting Mr. Gordon's account in the Steelworkers application to his employer, nor in the employer paying it directly to Mr. Appleman's counsel.

9. In support of that position counsel for Mr. Appleman stressed that there is no evidence of any undertaking by the company to pay Mr. Gordon's fee prior to his having been retained by Mr. Appleman. While he concedes that a prior arrangement by an employer to defray the legal costs of employees seeking to oppose a union's certification or to terminate its bargaining rights would constitute unlawful interference with a trade union, he maintains that there is nothing improper or unlawful where the payment or undertaking takes place entirely after the fact, once the proceedings before the Board are entirely disposed of. In his submission there can be nothing objectionable so long as it is not the employer who, in his words, "lights the fire". That submission raises some fundamental questions about the boundary of employer interference under the Act.

10. It is central to the *Labour Relations Act* that an employer is not to interfere with the administration of a trade union or in the matter of representation of his employees by a union. Section 64 of the Act provides:

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

11. The right of an employee to freely choose or not to be represented by a trade union is protected under the Act. It is specifically protected from interference by the employer, whether by coercion or bribery. Section 66(c) of the Act provides:

66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, *or by any other means* to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

(emphasis added)

The Act contemplates that apart from the reasonable exercise of his freedom to lawfully

express his views an employer should be uninvolved in any exercise of rights by employees under the Act. That is so whether his interference takes the form of threats or intimidation aimed at union supporters or favours or financial support given either to union supporters or to union opponents among his employees.

12. The most common form of employer financial support proscribed by the Act relates to the employer dominated union. The Act contemplates that as a precondition to certification, the union and employer must be in a clearly arm's length relationship. (*Dr. George A. Morgan Dental Centre* [1977] OLRB Rep. Jan. 1). Section 13 of the Act bars the certification of the "sweetheart" union in the following terms:

13. The Board shall not certify a trade union if any employeey or any employers' organization has participated in its formation or administration or has contributed financial or other support to it or if it discriminates against any person because of his race, creed, colour, nationality, ancestry, age, sex or place of origin.

13. The Act goes further to provide that an agreement between an employer dominated organization and the employer is not a collective agreement for the purposes of the Act. Section 48(a) provides:

48. An agreement between an employer or an employers' organization and a trade union shall be deemed not to be a collective agreement for the purposes of this Act,

(a) if an employer or an employers' organization participated in the formation or administration of the trade union or if an employer or an employers' organization contributed financial or other support to the trade union;

14. The Board has in the past not only found that a sweetheart agreement is not a collective agreement for the purposes of the Act, but has concluded that a trade union purporting to be party to such an agreement has relinquished its status as a trade union under the Act. (See, *Norfish Ltd.* [1965] OLRB Rep. Sept. 414 at 416). An employer dominated body is not a union within the meaning of the Act.

15. It is no less improper for an employer to support employees opposed to a union than it is for an employer to support a union itself. The cases are legion in which the Board has found that granting favours to employees who oppose a union and the encouragement of such employees, is contrary to the Act. That is so whether the employer assistance is in the form of a promise to pay the legal fees of employees opposing a union (e.g., *Selinger Wood Ltd.*, [1979] OLRB Rep. May 434) or providing employees time and facilities to organize and conduct anti-union meetings (e.g., *Skyline Hotels Limited*, [1979] OLRB Rep. Dec. 1811 at 1820-21). The Board has also found that repeated company sponsored meetings aimed at exhorting anti-union employees to organize are employer interference with employees' rights contrary to the Act, (*K. Mart Canada Ltd.*, [1981] OLRB Rep. Jan. 60 at 72, 80-81).

16. An employer can align himself neither with the employees who favour a union nor with those who are opposed. Doing so distorts the balance of choice and frustrates the free

exercise of employees' rights under the Act. Support to either camp, whether open or covert, amounts to interference contrary to the Act. While it may be impossible in the real world to expect employees to make their choice for or against a union in "laboratory conditions" unaffected by any outside influences, the Act strives insofar as possible to insulate the process by which employees select or reject union representation. Apart from the right to express his views, a right whose exercise requires some care, the Act imposes a simple rule for the employer: "Do not interfere". That rule, it should be stressed, is generally accepted and observed by the vast majority of employers who appear before the Board in applications relating to the representation of their employees by a union.

17. Interference can take many forms. The most obvious form of employer interference in opposition to a union is the threat or imposition of lay-offs or discharges, perhaps the largest single source of section 89 complaints under the Act. More subtle forms of employer intervention have included the surveillance of employees (e.g., *K Mart, supra*) and their transfer within the employer's operations contrary to a reinstatement order of the Board (*Radio Shack* [1978] OLRB Rep. Dec. 1128). Interference has involved the adverse treatment of supervisors who are openly sympathetic to a union (*A.A.S. Telecommunications Ltd.*, [1976] OLRB Rep. Dec. 751); transferring control over employment to a related subcontractor who refuses to hire union members (*Culverhouse Foods Inc.*, [1977] OLRB Rep. Jan. 16) and transferring union activists to a separate part of the employer's operations that is peculiarly susceptible to layoffs (*Consumers Distributing Co. Ltd.*, [1977] OLRB Rep. Aug. 491). A more overt form of interference was found when an employer closed the unionized part of its operations, eliminating the union and chilling the prospect of union activity among its remaining employees (*Academy of Medicine*, [1978] OLRB Rep. Apr. 375). Interference with a trade union has also been found after bargaining rights have been established, notably where an employer has hired agents to infiltrate a union (*Radio Shack*, [1979] OLRB Rep. Dec. 1220) or has impounded union dues (*Truck Engineering Ltd.*, [1978] OLRB Rep. Jan. 70). These examples are by no means exhaustive but serve merely to show the variegated forms employer interference can take.

18. Is unlawful interference with the selection or administration of a trade union or with the rights of employees made out in this case? In the instant case an employee succeeded in defeating an application for certification. It would surely be unlawful for his employer to have rewarded him for his efforts, *ex post facto*, by giving him a promotion or granting him a raise purely for defeating the union, just as it would be unlawful to penalize an employee who worked for the union's cause. Either act would be in violation of section 66 of the Act, no matter when it occurred. The "hands off" rule knows no time limitation: it binds the employer before, during and after an application for certification.

19. The evidence establishes that the employer paid the cost of the employee's legal representation at a Board hearing. There is no evidence that the respondent has paid other legal accounts for this or any other employee or that it has otherwise made a practice of volunteering financial assistance to needy workers. The payment of the legal account can only be characterized as a financial subsidy or reward to an employee related specifically to his anti-union efforts.

20. The fact that the payment was not pre-arranged can in no way change the quality of the employer's action insofar as the *Labour Relations Act* is concerned. It is plainly contrary to the Act for an employer ever to financially reward an employee, whether it be for starting a

union or for stopping one. The reason for the prohibition is obvious since rewards in such circumstances poison the workplace in a number of ways.

21. Firstly, they have an obvious impact on the ongoing relationship between the employer and the employee upon whom the benefit is conferred. Expectations are created and an unspoken understanding runs between the employer and employee. Each knows where the other stands and knows that their *ad hoc* partnership can be revived as needed in the future.

22. The taint of such a transaction, however, extends beyond the employer and employee concerned when knowledge of their accommodation reaches other employees. They will have reason to believe, as a general matter that anti-union activity on the part of employees will be rewarded. They will also have every reason to assume that a bond exists between the rewarded employee and their employer where the issue of trade union representation is concerned. If the employee in question was once known to his fellow employees to be acting independently, they cannot from that time forward have other than reasonable suspicions that his activities in relation to union representation have the approval and support of their employer.

23. When legal representation is involved there is a further mischief. Being unfamiliar with the canons of legal ethics, rank and file employees may not have full confidence about what facts a solicitor is at liberty to disclose to the party that pays directly for his services to another. They may have a natural concern that the names of those who sign the employee petition will become known to the source that appears to pay for it.

24. In this case the wording of the document makes it plain that it originates with the law firm previously paid by the employer. It provides:

We, the undersigned employees of Empco-Fab Ltd., no longer wish to be represented by the Shopmen's Local Union 834 of the International Association of Bridge, Structural and Ornamental Iron Workers, and wish to have its right to bargain on our behalf with our employer, Empco-Fab Ltd., terminated.

For the purpose of any hearing before the Ontario Labour Relations Board, we appoint the firm of:

Beard, Winter, Gordon
Barristers and Solicitors
200 University Avenue
Toronto, Ontario
M5H 2K4

to appear on our behalf.

25. The issue to be resolved is whether in these circumstances the Board can be satisfied that the petition sponsored by Mr. Appleman was signed by the employees voluntarily and without fear of employer involvement in the petition. We do not see how it can. Any employee who knew, as an indefinite number of employees did, that Mr. Appleman's solicitor was

previously paid by the employer, must have natural concern about the consequences of refusing to sign the petition.

26. In this regard it is noteworthy that when the respondent union made its application for certification in 1981 (Board File No. 0112-80-R) Mr. Appleman again sponsored an anti-union petition. On that occasion he did not retain legal counsel and his petition was a handwritten draft on a piece of paper in his own handwriting. Not a single employee signed it. Counsel for Mr. Appleman submits that that is evidence that the applicant is not viewed by fellow employees as being in league with the employer. In our view, that evidence establishes only that when Mr. Appleman acted without the solicitor known to have previously acted for him no one signed his petition. In this case, one year later, all but two of the employees in the bargaining unit signed the petition. We cannot be satisfied that in the instant case the petition did not raise concerns among the employees about the employer's previous financial link with Mr. Appleman. In our view the inference to be drawn from the evidence is that a reasonable employee had grounds for concern. Having regard to the totality of the evidence the Board cannot conclude that more than 45% of the employees in the bargaining unit have voluntarily signified their desire in writing to no longer be represented by the respondent.

27. The application is therefore dismissed.

DECISION OF J.A. RONSON, BOARD MEMBER;

Decision of Board Member J.A. Ronson will follow.

1276-81-R Service Employees Union, Local 204 Affiliated with A.F. of L., C.I.O., C.L.C., Applicant, v. **Extendicare Diagnostic Services**, Division of Extendicare Limited, Respondent, v. Group of Employees, Objectors.

Bargaining Unit – Employee – Whether purchasing agent exercising management functions – Whether lab reporters having community of interest

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members W. H. Wightman and B. L. Armstrong.

APPEARANCES: Naomi Duguid, Joe Aggimenti and Allen Ferens for the applicant; James E. Bowden, Donald McKillop, Dawn Jeffery and Joyce Allin for the respondent; Adelyne Bornstein and Doreen Lash for the objectors.

DECISION OF THE BOARD; August 20, 1982

1. This is an application for certification.

2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

3. The applicant has applied to be certified as bargaining agent for all office and clerical employees employed by the Extendicare Diagnostic Services Division of Extendicare Limited in Metropolitan Toronto. It is one of two applications for certification filed by the applicant with respect to the employees of that Division at its 11 locations in Metropolitan Toronto. The other one is with respect to an all employee type of unit referred to by the parties as the technical unit. See the decisions of the Board, differently constituted, in Board File No. 0722-81-R which issued August 17, 1981 and May 18, 1982. The parties herein agreed with the respondent's description, set out in paragraph 5 of its reply, of the *inclusive* part of the bargaining unit which it claimed to be appropriate for collective bargaining. The applicant and respondent were not in agreement, however, on the description of the exclusions from the bargaining unit. More specifically, the applicant sought the exclusion of purchasing agents from the unit on the grounds that Joanne McGarry, classified on the lists filed by the respondent as purchasing agent, exercised managerial function within the meaning of section 1(3)(b) of the *Labour Relations Act* and did not share a community of interest with the other employees who were agreed to be in the unit. The applicant claims as well that Doreen Lash, classified on the lists filed by the respondent as senior data entry operator, should be excluded because she exercised managerial function within the meaning of section 1(3)(b) of the Act. The respondent, on the other hand, claims that Joanne Ewing and Dale Jacobs, classified on the respondent's lists as lab. reporter, should be excluded from the unit because they do not share a community of interest with the other employees in it. The applicant and respondent advised the Board that Ewing and Jacobs are at issue in Board File No. 0722-81-R wherein the applicant is claiming that they should be included in the technical unit. The parties are agreed that they are employees who would be in one unit or the other. The applicant challenged as well the accuracy of the lists filed by the respondent.

4. A Board Officer was appointed to inquire into and report to the Board on the duties and responsibilities of Lash and McGarry, on the community of interest, if any, between McGarry, Ewing and Jacobs and the other employees in the unit and on the list of employees filed by the respondent. The applicant subsequently dropped its challenge to the lists and its claim that McGarry did not share a community of interest with the other employees in the unit. That challenge with respect to McGarry was dropped at the hearing scheduled to receive the submissions of the parties with respect to officer's report. The submissions of the parties with respect to the remaining issues were heard during hearings on two separate days at neither of which were the objectors represented. The issues were:

- (a) whether Lash and/or McGarry exercised managerial functions within the meaning of section 1(3)(b) of the Act; and
- (b) the community of interest, if any, between Ewing and Jacobs and other employees in the bargaining unit.

5. All four employees at issue are employed at the same location of the respondent, 4949 Bathurst Street in Metropolitan Toronto, as are the majority of the employees in the office and clerical unit. The Board has considered the evidence in the report of the Board Officer and the submissions thereon of the applicant and the respondent and finds as follows.

6. Neither Lash nor McGarry exercise managerial function within the meaning of section 1(3)(b) of the Act. The report reveals that their regular duties and responsibilities do not include, at all times material to the application, the hiring or firing of employees, evaluating their performance, disciplining them, scheduling their hours of work or granting

time off from work. Nor do either of them make effective recommendations with respect to any of those matters. McGarry does not exercise any type of supervision over the work of other employees. Lash was assigned the responsibility of making sure that the batches of source documents which the data entry operators entered for processing on the computer were distributed evenly between the operators on the day shift and the night shift. This responsibility was added to her responsibilities in June 1981 as the result of a problem arising out of insufficient computer processing capacity. A notice was posted at the time appointing her as senior data entry operator responsible for the supervision of data entry operators. There is no evidence that the supervision consisted of anything more than the distribution between the operators of the batches of source documents. The evidence also indicates that the need for this particular function ceased to exist within approximately two months of her appointment, although the respondent did not rescind its notice of her appointment. In any event, the Board is satisfied that Lash's responsibilities were not even those of a leadhand.

7. The applicant argues that McGarry, as purchasing agent, exercises a level of decision making which requires independent judgement such as should cause the Board to judge her to be exercising managerial function. (See *Inglis Limited*, [1976] OLRB Rep. June 270). The Board is satisfied that the evidence in the officer's report simply does not support such a finding.

8. For the foregoing reasons, the Board finds that Doreen Lash and Joanne McGarry, classified by the employer respectively as senior data entry clerk and purchasing agent, do not exercise managerial function within the meaning of section 1(3)(b) of the Act. They are, therefore, employees within the meaning of the Act and would fall within the bargaining unit sought by the applicant.

9. The Board turns now to consider the community of interest question with respect to Joanne Ewing and Dale Jacobs. The community of interest which exists between employees, or the absence of it, is one of several factors which the Board takes into consideration when determining whether a unit is appropriate for collective bargaining purposes. See the Board's decision in *Usarco Limited*, [1967] OLRB Rep. Sept. 526 at p. 529. That decision in turn identifies six sub-factors or criteria for determining community of interest:

- (a) nature of work performed
- (b) conditions of employment
- (c) skills of employees
- (d) administration
- (e) geographic circumstances
- (f) functional coherence and interdependence

10. Ewing and Jacobs refer to themselves as clerks, although they are classified on the lists filed by the respondent as lab. reporters. The Board sees no significance in this distinction and will refer to them as lab. reporters. They work in a section of the respondent's premises at 4949 Bathurst Street referred to as lab. results. These premises include also the main offices of

the Division and three laboratories and, as already noted, the majority of the office and clerical employees are employed at this location, the exceptions being the receptionists who work at some of the other locations. Lab. results provides a central filing facility for all of the test results from the laboratories at that location and from the other ones. The lab. reporters separate and file the forms on which the test results are recorded and record tests from some laboratories in registers or books maintained in lab. results. This work consists in the main of simple filing tasks and some typing, generally limited to the typing of envelopes. Approximately 75 per cent of their work time is spent on these tasks. Most of the remainder is spent locating test results in the laboratories at this location in answer to queries from doctors and other customers about the tests which they have requisitioned. This requires them to go into the laboratory in question and either or both check out the register where the laboratory staff record test results and/or seek out the technologist responsible. On the other hand, it is sometimes necessary for laboratory staff to go into lab. results and check with the lab. reporters or check the files to see if a particular result has been correctly recorded. The lab. reporters also take and fill orders from doctors for supplies of blank test requisition forms and specimen containers. The skills required by their duties are very basic clerical ones.

11. Test specimens and requisitions are brought several times daily to these laboratories by drivers in special bags for this purpose. When tests have been completed by the laboratory staff and the results recorded on the requisition, two copies of the requisition are sent to lab. results. The lab. recorders separate these, filing the Division's copy and placing the customer's copy in a filing rack by customer. The drivers pick up these results, place them in the customer's bag and deliver them to the customer.

12. The lab. reporters work day shift only, as do most of the office and clerical employees, the one exception in evidence being a data entry operator. The laboratory staff work shifts, although the evidence indicates that not all of them do. There appears also to be a night driver. There are no other differences discernible from the evidence in the methods of payment, working conditions or benefits between any of the employees in the technical unit and the office and clerical employees, or between the lab. reporters and either group of employees.

13. The lab. results section is located on the lower level of the premises referred to as the basement in a room adjacent to one of the laboratories. Another laboratory is located on the second floor, the same floor as the office. There are two receptionists located at the basement level nearby the lab. results room. They are in the proposed office and clerical unit. They receive patients coming to have tests done or have test specimens taken. The test requisitions for these patients also end up in lab. results when the tests have been completed, but do not come directly from the receptionists. The receptionists receive telephone queries from doctors about test results and refer these for handling to the lab. reporters. In addition to these two receptionists, one of the secretaries on the second floor performs receptionist duties for the office. Twice daily the lab. reporters deliver test results and pick up requisitions from doctors who have offices in the building at 4949 Bathurst Street. On these rounds they stop at the laboratory on the second floor and pick up test results. They also drop off any mail for the office on that floor with the office receptionist.

14. The office and technical functions of the Division, including the satellite stations outside of 4949 Bathurst Street, report to Dawn Jeffery, assistant vice-president. One of the positions reporting to her is that of office manager. Joyce Allin, the office manager, is

responsible for accounting, lab. results, the receptionists and transportation. Transportation includes the drivers and one person referred to variably as the shipper/receiver or supplies man. They are employees in the technical unit. The supervisor responsible for transportation is Jo Albani and she is also the supervisor responsible for lab. results. Allin looks after the receptionists and accounting, both of which are in the proposed office and clerical unit, with assistance from another person in the supervision of part of the accounting function.

15. The criteria of nature of the work, conditions of employment and skills are of little assistance in determining community of interest in this instance. There is little in the evidence about conditions of employment which assists in distinguishing technical employees from office and clerical. Nature of work and skills points slightly in favour of office and clerical. Administration, geographic circumstances and functional coherence and interdependence point towards the community of interest being with the technical unit. While Allin's overall responsibility includes persons who, without dispute, fall into both units, accounting and receptionists, which are her own direct responsibility, are in the office and clerical unit. Responsibility for supervision of transportation and lab. results has been delegated by her to Albani who is excluded from either unit. Transportation employees are in the technical unit. There is regular daily liaison between Ewing and Jacobs and the drivers as well as the shipper/receiver essential to the performance of their work. There is regular daily liaison as well with the laboratory staff who are in the technical unit as a requirement of their jobs as lab. reporters. Both employees consider that they have more frequent and regular contact with the drivers than any other group of employees and this is supported by the evidence in the report. These latter criteria, in the Board's view, are more indicative of a community of interest with the employees in the technical unit than with those in the office and clerical unit.

16. Having assessed these criteria, the Board finds that the community of interest of the lab. reporters, Joanne Ewing and Dale Jacobs, is with the technical unit. The Board, accordingly, will exclude them from the office and clerical unit. Since the parties are agreed that they are employees who would fall in one unit or the other, they would expect them to be included in the technical unit. That is a finding to be made, however, by the Board seized with that application and cannot be made by the Board herein notwithstanding the fact that the Board's decision which issued May 18, 1982 in Board File No. 0722-81-R advised the parties that the Board in the case at hand would determine their status.

17. The result of all of the foregoing, is that Doreen Lash, senior data entry operator, and Joanne McGarry, purchasing agent, are included in the office and clerical unit and Joanne Ewing and Dale Jacobs are excluded from it.

18. In view of that conclusion, having heard the representations of the parties on the exclusions from the proposed bargaining unit and having regard for their agreement on the inclusive part of the unit description the Board finds that:

all office and clerical employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, persons secretary to the assistant vice-president, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period,

constitute a unit of employees of the respondent appropriate for collective bargaining.

19. For purposes of clarity, the Board notes the agreement of the parties that Pearl Bahla who, according to the respondent, performs public relations responsibilities, is not an employee in the unit described above.

20. The lists of employees filed by the respondent, *excluding* Ewing and Jacobs, contain the names of 22 employees in the bargaining unit described above. The union filed 11 good cards in the names of persons whose names also appear on the respondent's lists. A petition was filed in opposition to the application. Since the applicant is already in a vote position and that is the best result which a successful petition can achieve, it is unnecessary for the Board to deal with the circumstances giving rise to the petition being filed. The Board, therefore, is satisfied that not less than forty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on September 18, 1981, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

21. A representation vote will be taken of the employees of the respondent in the bargaining unit. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

22. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

23. The matter is referred to the Registrar.

0865-82-U Mechanical Contractors Association of Ontario, Applicant, v. **Fahrhall Mechanical Limited**, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552, Jerry Boyle, Mido Martinello and Ernie LaRiviere, Respondents v. Ontario Pipe Trades Council, Interested Party

Construction Industry – Strike – Unfair Labour Practice – Local union supplying tradesman to perform work on hospital construction job during lawful province-wide strike – Breach of sections 146(2) and 148(1) – Whether Board recognizing humanitarian grounds as exception – Work not emergency – Board recommending consultation between two bargaining agencies where emergency work required

BEFORE: D. E. Franks, Vice-Chairman, and Board Members W. H. Wightman and H. Kobryn.

***APPEARANCES:** G. Grossman and G. Opacic for the applicant; Leon Paroian, Q.C. for the respondent Fahrhall Mechanical Limited; M. Zigler and Jerry Boyle for the respondents United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552, Jerry Boyle, Mido Martinello and Ernie LaRiviere; T. Berry for the interested party.*

DECISION OF THE BOARD; August 31, 1982

1. This is an application for a direction under section 135 of the *Labour Relations Act*, in which the applicant, Mechanical Contractors Association of Ontario (hereinafter referred to as the "MCAO"), seeks a direction under section 135 and relied under section 89 of the Act with respect to the various respondents. The respondent, Fahrhall Mechanical Limited (hereinafter referred to as "Fahrhall"), is an employer of plumbers in the Windsor area. The respondent, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 552 (hereinafter referred to as "U.A. Local 552") is an affiliated bargaining agency represented in provincial bargaining by a designated employee bargaining agent. The Ontario Pipe Trades Council which was added as an interested party is a component of that employee bargaining agent. The respondent Jerry Boyle is business manager of U.A. Local 552. The respondent Fahrhall was bound by the previous provincial agreement between the designated employer bargaining agency and the designated employee bargaining agency with respect to plumbers in the province of Ontario. Bargaining for the renewal of that provincial agreement reached an impasse in May, 1982 and since May 23rd, tradesmen represented by the designated employee bargaining agency have struck employers represented by the designated employer bargaining agency.

2. In the present application, the applicant MCAO alleges that the respondent Fahrhall employed the two individual respondents, Mr. Mido Martinello and Mr. Ernie LaRiviere as a result of an arrangement between Fahrhall and the respondent U.A. Local 552 and by so doing have violated section 146(2) of the Act. Further the respondent U.A. Local 552 and its business manager, Mr. Boyle, have violated section 148(1) of the Act.

3. Although the application was based on section 135 of the Act, it is clear that the

applicant is primarily requesting relief under section 89 of the Act. Thus, it was not argued before the Board that the conduct of the respondents make the whole strike unlawful, but rather that the Board should grant relief under its remedial powers under section 89 for the alleged violations of sections 146 and 148.

4. At the root of the case put forward by the MCAO is the fact that during the strike Jerry Boyle and U.A. Local 552 have supplied men to the respondent Fahrhall to two job sites in the Windsor area. Both job sites in question concern work at hospitals in the city of Windsor. At one site, the Metropolitan Hospital, the work in question concerns the work on the second floor of the west wing in which a ward, previously used as chronic care ward, is being converted into a modern critical care unit. This project ranges from the demolition of the existing interior walls through to the construction of the new facility. At the other job site, Grace Hospital, work involves a similar modification to a floor from various uses to a centralized renal dialysis area. Like the job at Metropolitan Hospital it involves the demolition of interior walls and the rebuilding of the facility on a particular floor. In both cases, the mechanical contract involves work during the demolition of existing walls where various piping systems need to be capped, altered, or diverted, through to the construction of various new piping systems involving medical gas, domestic water and sewage systems.

5. Both the respondent, Fahrhall and the respondent U.A. Local 552 admit that work has been performed on the sites during the strike. The position taken by Fahrhall is that in both instances the hospital and the general contractors performing the work insisted on having a plumber on the job site in the event that an emergency were to take place requiring the skills and expertise of a plumber to repair immediately. The position taken by the U.A. Local 552 through its manager, Mr. Boyle, is that out of "humanitarian grounds" the union would not strike work performed at a hospital. Neither of these positions is completely consistent with the facts in this case. It is clear that work has been progressing on both sites. Indeed, Mr. Fahringer's evidence was that the work at Grace Hospital would eventually get completed by the one person. His position was that at the Metropolitan Hospital job site, which really required five or six journeymen, was more difficult to complete. This of course is not consistent with Mr. Boyle's position since the union by only supplying one journeyman rather than the five or six as estimated by Mr. Fahringer the union is conducting a partial strike. Further, it is clear on the evidence, that the work being performed is not work of an emergency nature. Plain and simply put, the work was part of the normal mechanical contract on the hospital sites. Indeed, counsel for the respondent trade union called witnesses from the two hospitals concerned and it was clear from their evidence that they were quite happy that work was progressing on their jobs albeit at a rather slower pace than they wished.

6. One further fact should be noted about the work being performed on both sites. The union takes the position that it was only supplying one tradesman to each job site. However, it is clear from the evidence of Fahringer and others that the employer, Fahrhall, had more than one tradesman on the job at various times. This is consistent with the evidence presented by the applicant that the job site had all the appearance of a normal site where construction was taking place.

7. The position taken by the applicant in this case is that the arrangement to supply tradesmen between Fahrhall and U.A. Local 552 is a violation of section 146(2) of the Act. Further, the applicant takes the position that the avowed intention of the local to supply tradesmen to work at the hospital construction during the strike itself constitutes a violation of

section 148(1). The respondents do not really deny a violation of these sections. The position taken by the respondent, Fahrhall, is that the work was emergency work required by the hospital and, therefore, are not to come within the ambit of section 146 and 148 of the Act. The position taken by the other respondents is that the Board should not make work performed for a hospital the subject of any order by the Board because the work is being performed on what might broadly be described as humanitarian grounds or because it has a higher social value than mere labour relations.

8. Section 146 and section 148 are both sections in the Act relating to province-wide bargaining in the industrial, commercial and institutional sector of the construction industry. Section 146 which came into effect in 1978 is at the very heart of the scheme which we re-structured local bargaining into province-wide bargaining. That section reads as follows:

“(1) An employee bargaining agency and an employer bargaining agency shall make only one provincial agreement for each provincial unit that it represents.

(2) On and after the 30th day of April, 1978 and subject to sections 139 and 145, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agent other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void.

(3) Every provincial agreement shall provide for the expiry of the agreement on the 30th day of April calculated biennially from the 30th day of April, 1978.”

The notion of one, and only one, allowable collective agreement for a particular trade in a particular area was a common practice by construction trade unions and construction employers prior to what is now section 146. All that this section did was recognize that the construction unions and employers made standard agreements in a given area and that the standard agreement was available to all employers of employees in a particular trade represented by a particular trade union. What the section required that are new was the consolidation of a number of local agreements into one collective agreement covering particular tradesmen for the whole of the province. Implicit in this section is the notion that every employer of a particular type of tradesmen employs them on the same terms as any other employer. Thus, individual employers should not be treated differently by the trade union they deal with, for example, giving one employer a better “deal” on wages than another employer employing the same group of tradesmen. The mandatory direction of subsection 1, that there be only one provincial agreement, is reinforced by a series of prohibitions in subsection 2. The Board has taken a broad view of what constitutes an arrangement prohibited by subsection 2. As the Board stated in *All-Pro Contractors et al* [1982] OLRB Rep Aug. 1109:

“It is also apparent that the legislators, in dealing with the uniquely

complex and sensitive process of province-wide bargaining, recognized that it could never hope to anticipate the full range of creativity with which the labour relations community would respond to the legislation, and thus employed language which is striking by its breadth. It is left to the knowledge and experience of the Ontario Labour Relations Board to give that language a meaning which will be true to the goals of the legislators. As the Board put it, again in *Sikora Mechanical Ltd.*, *supra*, at paragraph 20:

...Moreover, to guard against the inventiveness of particular parties, general statutory language was used to give the Board a broad mandate to regulate this very important economic process.”

This provision makes it clear that a trade union in provincial bargaining must bargain with the employer bargaining agency and not with individual employers.

9. Section 148 which was introduced into the Act in 1980, imposes a further rule in the manner in which the economic warfare of strikes may be conducted in a regime of multi-employer bargaining. Section 148(1) reads as follows:

“Where an employee bargaining agency desires to call or authorize a lawful strike, all of the affiliated bargaining agents it represents shall call or authorize the strike in respect of all the employees represented by all affiliated bargaining agents affected thereby in the industrial, commercial and institutional sector of the construction industry referred to in clause 117(e), and no affiliated bargaining agent shall call or authorize a strike of such employees except in accordance with this subsection.”

The main thrust of section 148(1) is consistent with the underlying assumptions of section 146 about multi-employer bargaining relationships. Section 148(1) requires an employee bargaining agency when engaging in a strike to obtain a provincial agreement, to act consistently with respect to the group of employers affected by the strike. Thus, once the strike is called or authorized, neither the employee bargaining agency nor any of its affiliates can embark on a course of action which treats individual employers or group of employers differently from the total group of employers represented by the employer bargaining agency. Thus, the union affected by that section cannot embark on a strike policy which singles out individual employers. The policy origins of such a provision relate to the basic unfairness involved in treating certain employers one way and other employers another way when ultimately both groups of employers will become bound to the same provincial agreement by operation of law.

10. It is in the context of this basic policy of treating all employers in a similar manner as a matter of fairness, that we are being asked to make two specific exemptions by the respondents in the present matter. The respondent trade union is in effect asking the Board to exempt hospital construction from the general rules concerning collective bargaining and the use of economic warfare in collective bargaining by saying that hospital construction is exempt from the prohibitions in sections 146 and 148. Counsel for the respondent trade union thus argued that the Board should recognize humanitarian action of the respondent trade

union in supplying men for a hospital project. Indeed, as a much higher social good, hospital construction ought not to be delayed. Counsel went on indeed to mount a compelling argument as to why hospital construction should perhaps be governed by the *Hospital Labour Disputes Arbitrations Act* rather than the *Labour Relations Act*. In interpreting sections 146 and 148 we are not prepared to distinguish between the purchasers of construction as suggested by counsel for the respondent trade union. In this regard we fail to see a compelling distinction between the hospital as a purchaser of construction and any other purchaser of construction. Indeed, many purchasers of construction point to “broader social values” which can justify the completion of their particular project during a construction site. Section 146(2) makes no exceptions in this regard and we are not for the present inclined to make exceptions to that section based on the character of the purchaser of the construction. In our view, the work stoppage associated with a strike is an economic phenomenon of the same type as the level of wage rate negotiated to settle the strike. Any collective agreement negotiated to settle a strike will ultimately apply to all contractors and thus to all perspective purchasers of construction. For these reasons we refuse to distinguish between purchasers of construction during a strike.

11. The position taken by the respondent Fahrhall is that the employees were employed to deal with “emergencies”. Specifically, we find as fact in this case that this was not so. The employees involved were used to perform the mechanical contract which Fahrhall was obligated to perform and while it may be that a certain amount of their time was spent performing what might be classed as an “emergency function” we are not prepared, on the evidence, to find that this characterizes their employment relationship. We would like to note, however, that there are undoubtedly circumstances in which emergency construction might be performed during a strike and the Board would in its discretion refuse to issue any remedy for a violation of either section 146(2) or 148(1). Thus, in cases where construction was necessary to prevent danger to life or the destruction of property or the general health and safety of the public, the Board might consider such construction to be emergency construction and refuse to issue a remedy. In such circumstances, however, we would suggest that the proper course of action for the parties concerned would be for discussions to take place between the two provincial bargaining agencies rather than be the subject of negotiations solely between an individual employer and the trade union. If the work in question is truly emergency construction, then the consultation between the two bargaining agencies removes any suggestion that the individual employer is being treated differently from other employers affected by the strike.

12. For the foregoing reasons, we therefore, find a violation of sections 146(2) and 148(1) of the Act. Pursuant to the Board’s remedial powers in section 135 and section 89 the Board therefore directs and orders:

- (a) that Fahrhall Mechanical Limited and any other employer having notice or knowledge of this order forthwith cease and desist from employing any person represented by U.A. Local 552 or any other trade union affiliated with the employee bargaining agency with which U.A. Local 552 is affiliated on construction projects in the ICI sector of the construction industry at which employers for whose employees U.A. Local 552 holds bargaining rights until the strike is terminated.

- (b) that Jerry Boyle and U.A. Local 552 forthwith stop supplying members of U.A. Local 552 to Fahrhall Mechanical Limited to perform work on construction projects in the ICI sector of the construction industry until the strike is terminated.
 - (c) that Mido Martinello and Ernie LaRiviere forthwith cease and desist from performing work on construction projects in the ICI sector of the construction industry until the strike is terminated.
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**0431-82-R Canadian Union of Public Employees, Applicant, v.
Regional Municipality of Hamilton-Wentworth, Respondent**

Certification – Employee – Persons employed in rehabilitative work program funded by government – Whether “employees” for purposes of Act

BEFORE: R.O. MacDowell, Vice-Chairman, and Board Members S. Cooke and F.W. Murray.

APPEARANCES: Helen O'Regan for the applicant; C.E. Humphrey, L. Fleming, T.A. Cruickshank for the respondent.

DECISION OF VICE-CHAIRMAN R.O. MACDOWELL AND BOARD MEMBER S. COOKE; August 26, 1982.

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

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4. Having regard to the agreement of the parties, the Board further finds that if the individuals potentially affected by this application are “employees” of the respondent, the unit of those employees appropriate for collective bargaining should be described as follows:

All employees of the respondent employed at 50 Murray Street West, in the City of Hamilton, save and except supervisors, employees above the rank of supervisor, and clerical employees”.

In so finding the Board notes that the bargaining unit description was not put in issue before us, and in accepting the parties’ agreed description, we do not resile from the Board’s general reluctance to accept descriptions which directly or by implication are limited to an employer department or (in the case of a public employer) a program.

5. The respondent contends that the individuals potentially affected by this

application are not its employees; rather, they are participants in a rehabilitation program designed merely to simulate employment. The respondent argues that they are not entitled to form or join a trade union, or bargain collectively under the *Labour Relations Act*. The applicant union concedes that the employment of these individuals has a rehabilitative aspect, but argues that they are nevertheless “employees” within the meaning of the Act. In the union’s submission, the respondent may be an employer of last resort, but it is still an employer to which the Act applies.

6. The Helping Hands program has been operated by the Social Services Department of the Hamilton-Wentworth region since 1976 when it was determined that there was a need to provide home maintenance and related services to elderly citizens who by reason of age or infirmity could no longer provide for themselves. But since the provision of these services (i.e. cleaning, washing windows, installing screens or storm-windows, defrosting refrigerators, fetching groceries, cutting lawns, etc.) did not require any particular skills, it was decided that they could be provided by individuals on the Municipal Welfare Rolls at minimum cost, and some advantage to both the persons employed, and the recipients of their services. In this respect, it might be said that the program has two purposes: to assist the elderly; and to assist some of the chronically unemployed individuals on the welfare rolls, who through working with the respondent might be able to both provide for themselves through their own efforts and improve their job habits and skills sufficiently so as to be able to compete in the regular job market. By employing individuals on the municipal welfare rolls, the respondent hopes to provide not only services to persons in need, but also useful employment experience to persons who have previously had difficulty holding a job.

7. For the most part, the senior citizen clients do not pay for the services they receive, and those who do, do not pay the full value. Initially, the program was substantially funded by a Federal Government Local Initiatives Program grant. It is now funded to the extent of some 80% by the province and 20% by the municipality. Funding is reviewed annually and the number of individuals in the program is governed accordingly. There is no evidence concerning the particular statute pursuant to which these funds are dispersed or the government department(s) through which they are administered.

8. Potential “participants” are drawn from the Municipal Welfare Rolls and may be referred by social workers, Canada Manpower, or other agencies concerned with employee retraining. Participants fill in an application at the municipality’s welfare office and are interviewed by Ruth Cioruch, the project manager. Ms. Cioruch was formerly employed by the Amity Rehabilitation Centre which runs a program similar to that of *Goodwill Industries*. She determines whether the applicants are appropriate and considers whether they are interested in earning a regular hourly wage, and “bettering themselves”. Often the potential applicants are bored, have serious personal problems, or little education, and have been unemployed or only sporadically employed for long periods.

9. Ms. Cioruch testified that about one in eight applicants is selected. Those who appear apathetic or seem to be merely going through the motions, are rejected, or referred, if necessary, to other programs. Sometimes the persons hired have considerable work experience — as for example, a former Stelco employee with 20 years work experience who went “off the track” because of an alcohol problem. Another participant in the program had worked successfully for Dofasco for a year but was laid off and had marital problems. The respondent gives priority to persons who have difficulty participating in a competitive labour

market and who would otherwise be on social welfare. And, of course, the difficulties encountered by such individuals have been exacerbated by the current recession.

10. The program employs three supervisors, two dispatchers and a clerk typist. One of the supervisors was promoted to that position after working successfully in the program for 14 months. The participants work approximately 35 hours per week. For the first six months, they make \$3.50 per hour. If Ms. Cioruch, the program director, is satisfied that they are trying to improve, they are advanced to \$3.75 per hour and later, to a maximum of \$4.00 per hour. In addition, the respondent provides the participants with bus passes, and drug cards in recognition of their low wage rates. When they have no specific duties to perform (i.e. no snow in winter or specific demands from the elderly clientele) the participants are kept busy working for related social welfare agencies, receiving counselling or learning techniques which would allow them to participate in a more competitive labour market. For example, they learn how to complete resumes, participate in interviews, etc. They are paid for the time when they are engaged in this process, although, normally, as already noted, they are fully occupied actually working for the senior citizens.

11. The program participants are regularly assessed on their performance, and such things as tardiness, attendance, level of concentration, and so on, are noted, and may trigger a remedial response in terms of counselling or otherwise. Misbehaviour by one of the participants is dealt with in what the respondent considers to be a constructive way, either by counselling, discipline or both. An individual who fails to appear for work, may be suspended for a few days (after a verbal warning) to bring home to him that he has undertaken a responsibility to appear on a regular basis. Persons who are unable to follow instructions or have deep seated personal problems are terminated and sometimes referred to other social programs. Such persons go back on unemployment insurance or the municipality's welfare rolls.

12. The average participant stays in the program for between 18 months and 2 years. However, there are as many as five individuals who have continued to work for the respondent for as long as five years — that is, since the program's inception. Participants are encouraged to seek employment elsewhere and many participants in searching for other jobs is paid for by the respondent. It is a mark of success when an individual "makes it" in the competitive job market, and finds a job with a regular employer. Thus, in contrast to a normal employer who wants to keep experienced employees, the respondent is not unhappy to see program participants improve their skills and work habits, and leave.

13. While working for the respondent, participants sign in on a time sheet which becomes their daily attendance record. For payroll purposes, a computer card is completed which is sent to the municipality and processed as part of its ordinary payroll. Deductions are made for the Canada Pension Plan, Unemployment Insurance, and Income Tax if such is payable. Participants work approximately 35 hours per week; but certain individuals who are attendant-companions to elderly citizens work irregular hours in accordance with the needs of the persons whom they are serving. While carrying out their duties, the participants in the program are spot-checked by supervisors who ensure that they are performing their duties in a satisfactory manner.

14. To this point we have used the respondent's terminology and have referred to the

persons affected by this application as “participants”. For the sake of convenience we shall continue to do so, however the question before the Board is whether they are also “employees” within the meaning of the *Labour Relations Act*.

15. If one applies the usual legal criteria to the relationship between the respondent and the participants, there is little doubt that it points to an employer-employee relationship. The participants are not volunteers, students, or independent contractors. They work for wages. They are interviewed, hired for a job and paid at a fixed rate computed hourly, from which the usual “employee” contributions (U.I.C., C.P.P., income tax, etc.) are deducted. Their wages are dealt with by the payroll department in the same manner as other employees. They perform tasks assigned by the respondent and subject to the respondent’s express direction and supervision. Those tasks are not generically different from other social service functions performed by the respondent. The participants are providing services to the elderly which might not be provided otherwise, or would have to be provided with regular social service staff or municipal employees at much higher cost. While these services may not be considered essential to the ongoing operations of the region, one can envisage other municipal services which likewise are not “essential” in this sense. Adequate performance by the participants leads to limited advancement, while inadequate performance or misconduct may result in discipline or termination. Five of the twenty-eight individuals currently in the programme have worked for the respondent for more than five years. That is how they have earned their living, and the union submits that it would be incongruous for the Board to find that they are not employees with the same legal rights as other employees.

16. The respondent argues however that even if the participants have many of the characteristics of employee status the Board should consider the problem from a collective bargaining point of view. From this perspective, it is argued, it is extremely difficult to envisage the application of the usual machinery and sanctions of collective bargaining or to reconcile its premises with those of the program. In the respondent’s submission collective bargaining is an alien process which is potentially disruptive to the special relationship between the respondent and its clients. In this regard we were referred to a decision of the National Labour Relations Board in *Goodwill Industries of Southern California* 96 LRRM 1061 which involved a rehabilitative work program for persons whose physical, emotional and social handicaps rendered them ineligible for work in private competitive industry. At page 1062-3 the NLRB commented:

“From the foregoing, it is clear that the Employer’s clients whom Petitioner seeks to represent are employees in the generic sense of the term. Clients work for a set number of hours a day, perform functions which are of recognized economic value, and are paid for the performance of those functions. Nevertheless, it is equally clear that this employment relationship is different in many, if not most, significant respects from the normal employment relationship.

The focus of Goodwill’s employment concern is upon rehabilitating its clients and preparing them for work in private competitive industry, not on producing a product for profit. Prospective clients are “hired” not on the basis of their competence, but on the basis of the severity of the impairments — presumably the more severe their impairment, the more likely they are to be hired. Wages are the same regardless of the client’s

performance or tenure, and are as such an instrument of the rehabilitative process as they are recompense for productive activity. In addition, clients are counseled rather than disciplined, are rarely, if ever, discharged, and are allowed to continue their employment as long as they desire. The picture presented is thus that of an employer whose primary objectives are the converse of a normal employer's objectives — so much so that Goodwill might better be classified as a vocational clinic than as a viable entrepreneurial concern.

This unusual employer-client relationship presents us with that rare, possibly nonrecurring, instance where an employer's concern for the welfare of his employees competes with, and in some sense displaces, the Union's ordinary concern for employee well-being. The Union's normal objective — that of securing improved working conditions for the employees it represents — is here avowedly and convincingly embraced by the Employer itself — with, however, a difference in emphasis as to how that goal should be accomplished. To permit collective bargaining in this context is to risk a harmful intrusion on the rehabilitative process by the Union's bargaining demands. For example, if the Union demanded higher wages, this could well force the Employer to either reduce its client work force or hire more productive workers — thus compromising the Employer's rehabilitative efforts. Union demands for higher benefits for senior employees might tempt the Employer to reconsider its policy of keeping clients on as long as necessary. Conversely, union demands for unlimited employment tenure could prejudice the Employer's efforts to provide charitable employment to as many disabled people as possible. The collective-bargaining process, in short, is likely to distort the unique relationship between Employer and client and impair the Employer's ability to accomplish its salutary objectives.

On the basis of the above considerations, we are convinced that, although clients may arguably be said to be employees within the meaning of the Act, it will not effectuate the purposes of the Act to assert jurisdiction over them. Accordingly, we shall dismiss the petition."

The respondent contends that the Board should adopt the same approach and conclude that the respondent's clients are not employees within the meaning of the Act.

17. The respondent also drew our attention to a recent reference under section 51 of the *Employment Standards Act* concerning the employee status of an individual working in a Salvation Army sheltered workshop (see: *Re Christine Kaszuba and Salvation Army Sheltered Workshop*, decision of K.M. Burkett dated December 10, 1981). There, as in the instant case, the alleged employer argued that it provided only a "simulated" working environment for individuals who were not likely to be able to enter the competitive labour market, or who required such experience prior to entry into the competitive labour market. In *Kaszuba* there were 150 "clients" in the program, all of whom had been certified by a physician as medically unemployable. The majority of the clients were chronic schizophrenics who required continuing treatment and medication for their condition. The complainant Kaszuba, for example, had both psychiatric problems, and was subject to serious epileptic seizures.

These clients were paid a token rate of 50¢ per hour, which was calculated with reference to the forgivable allowance under the *Family Benefits Act* of which most of the clients were recipients. At any one time 80 of the 150 clients would be involved in the school program offered in conjunction with the Toronto Board of Education wherein they would learn English grammar and literature, mathematics, typewriting, arts and crafts, business machines, etc. Two qualified teachers on the staff of the Toronto Board of Education were assigned full-time to the Workshop to carry out the teaching responsibilities. The Workshop also employed a professional hairdresser to help clients with their grooming and organized social activities including a period at a Salvation Army Summer Camp for persons who wished to attend. In all the circumstances, and particularly having regard to the medical evidence that a simulated working environment was a medically accepted tool in the rehabilitation of mentally handicapped unemployables, the referee concluded that the clients were not “workers” or “employees” under the *Employment Standards Act*. The respondent urges this Board to reach the same conclusion on the facts here.

18. Before dealing with *Goodwill Services* and *Kaszuba* we wish to indicate one feature of the evidence which we do *not* consider determinative. We do not attach much significance to the fact that an arrangement may be described as a “make work” scheme funded in whole or in part by the public purse. Over the years (and particularly in times of economic difficulty) many Canadians have derived their wages through work support program such as Dree, LIP, the Young Canada Works Program, and numerous other schemes for the support of employment through direct channelling of Government funds to employers both public and private. The whole purpose of such program is to draw on the pool of unemployed workers in an area or category (e.g. youth), and it is not at all unusual to find that such program give preference to the “hard core” unemployed, whose U.I.C. benefits have expired and who have little chance of finding other jobs. Nor is it unusual that such individuals would be employed by a public sector employer to do annual work of a community service character. And, as in the instant case, the number of jobs provided will be contingent upon the funds made available. In today’s society there is nothing particularly novel about employment in a publicly funded “make work” program of limited duration where the participants have no real prospects of advancement. One may question the value of collective bargaining for such persons but that does not mean that they are not employees. (See: *Waterloo Roman Catholic Separate School Board*, [1977] OLRB Rep Dec. 856, and *Kelowna Centennial Museum Association*, [1977] 2 Can LRBR 285 — both of which involved persons employed in a government funded make work program, performing jobs which, but for those government funds would not be done.)

19. From a practical and policy point of view, we find that NLRB’s analysis quite attractive. It is difficult to fit the circumstances here into the adversarial model upon which collective bargaining is based. The respondent’s relationship with the participants is obviously not the same as that of a typical employer. Moreover, collective bargaining, if permitted, will take place under severe constraints. There are real impediments to the application of collective bargaining methods and sanctions (for example a strike). Indeed, one may well question the efficacy of formal collective bargaining for persons in the position of the participants here, and, as a practical matter, there may be little prospect of improving their economic circumstances without prejudicing the existence or scope of the programme itself. On the other hand, the NLRB view must be put in perspective. The issue there was somewhat different. We have to decide whether the participants are “employees”, while the NLRB had to determine whether it would exercise its discretion to exert jurisdiction over a charitable

institution — whether or not the individuals affected were employees. The NLRB has a discretionary jurisdiction to extend or restrict coverage of the statute which has no counterpart in Ontario, and in exercising that discretion the NLRB can make its own subjective assessment of the desirability of permitting collective bargaining. That is why the NLRB could conclude that the individuals in question were “arguably employees” yet still dismiss the application. Here the issue and the scope for discretion is much narrower. This is not to say that the Board should ignore the statutory purpose in making this, or any other decision. It is simply that in determining the coverage of the Act itself, the governing statute gives the OLRB less latitude than the NLRB.

20. The *Kaszuba* decision provides a useful backdrop against which the present case can be considered, but in our view the facts are readily distinguishable and the situation in this case is much closer to the line. The participants here are not medically certified as unemployable. They do not earn a token wage rate. They earn a rate fixed with reference to the minimum wage applicable to all employees in Ontario. This wage is not merely symbolic or an incentive. It is their livelihood, and some of them have been earning their living in this way for as long as five years. There is no program of teaching or social activities here. Counselling is secondary. The focus of the respondent’s program is steady remunerative work. Here, although lacking in skills and perhaps chronically unemployed, the participants do appear to be more or less employable. Rehabilitation is an aspect but employment is the dominant theme. In the circumstances it is much more difficult to deflect the cumulative effect of the factors pointing to an employment relationship. And, of course, despite our own expressed reservations about the efficacy of collective bargaining, we must note that the vast majority of the participants have signed membership cards indicating their desire to engage in that process. Thus, while the respondent may regard itself as an altruistic entity concerned solely with the welfare of the participants, the participants themselves appear to regard their position as similar to that of other employees, and, like other employees, they are seeking a measure of self determination through the vehicle of collective bargaining.

21. We have found this case a particularly difficult one, for the individuals affected here are on the periphery of the Act’s coverage, and neither the facts nor the policy considerations underlying the Act itself point unequivocally to the correct conclusion. And just as the Board has always given a liberal interpretation of the legislation in order to accomplish the objectives expressed in its preamble, it is our view that the Board should be equally careful about extending coverage where the logic of collective bargaining seems inconsistent with the character of the relationship potentially regulated. The concept of employment is a flexible one which must be determined, in part at least, by the statutory purpose and context. On balance, however, while this case is much closer to the line than *Kaszuba*, we are satisfied that the participants here must be considered “employees” — even though the program has a rehabilitative aspect, and the respondent, as an employer of last resort, has objectives which are different from those of an ordinary employer. Nevertheless, we do not think that the cumulative evidence of an employment relationship (summarized in paragraph 15) can be ignored, nor are the contrary indications sufficient to alter that conclusion.

22. The Board is satisfied on the basis of all of the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made were members of the applicant on June 10, 1982, the terminal date fixed for this application and the date which the Board determines under section 103(2)(j) of the

Labour Relations Act to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

23. A certificate will issue to the applicant.
24. The opinion of Board Member F.W. Murray will follow.

0420-82-R Labourers International Union of North America,
Local 183, Applicant, v. **Karvon Construction Limited**, Respondent.

Certification – Construction Industry – Practice and Procedure – Reconsideration – Employer not filing reply, employee list or specimen signatures – Board certifying applicant on basis of material before it – Employer requesting re-opening of matter and hearing – Request denied

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members H. Kobryn and J. Wilson.

DECISION OF THE BOARD; August 4, 1982

1. The Board issued a decision June 17, 1982 granting two certificates pursuant to section 144(2) of the *Labour Relations Act* to the Labourers International Union of North America, Local 183 ("Local 183"). The first certificate was issued to Local 183 on its own behalf and on behalf of all other affiliated bargaining agents of the Labourers International Union of North America and the Labourers International Union of North America Ontario Provincial District Council in respect of "... all construction labourers in the employ of [Karvon Construction Limited] in the industrial, commercial and institutional sector of the construction industry of the Province of Ontario. ...". The Labourers International Union of North America and the Labourers International Union of North America Ontario Provincial District Council together comprise the employee bargaining agency designated under section 139(1) of the Act to represent construction labourers in province-wide collective bargaining in that sector. The second certificate was issued to Local 183 in respect of all construction labourers in the employ of Karvon Construction Limited in the Board's geographic area #8, excluding the industrial, commercial and institutional sector. A letter dated July 20, 1982 from the solicitors for Karvon Construction Limited ("Karvon"), which was delivered to the Board that same day, concludes with the following paragraph:

"We would therefore ask for this matter to be reopened so that the employer may file a reply and for a hearing so that the employer may give evidence."

The Board considers this to be a request for it to reconsider its decision pursuant to its discretion under section 106(1) of the Act.

2. Karvon appears to be relying substantially on another decision of the Board, differently constituted, in Board File No. 0043-81-R. That was a decision which issued August 21, 1981 (Reported [1981] OLRB Rep. Aug. 1155) in respect of an application made under

section 144 of the Act by Local 183 in which Karvon was also the respondent. That application had been made on April 6, 1981 and a hearing was held into the application on June 5, 1981. The Board's record in that case reveals that Karvon's solicitors appeared at the hearing and made representations on behalf of Karvon with respect to the application. The Board found that the employees whom the applicant was seeking to represent were employees of another employer, not Karvon. In major part that decision states as follows:

"3. The applicant seeks to be certified to represent certain construction labourers engaged in general cleanup duties on the Normandy Place residential housing project in Oakville. It is the contention of the applicant that these labourers are the employees of the project manager on site, Karvon Construction Limited ('Karvon') and accordingly it named Karvon as the respondent in these proceedings. Karvon, however, contends that the labourers are in fact employees of the owner of the project, namely, Oakville Community Homes Incorporated ('Oakville'). It is not disputed that all other tradesmen on the project are employees of various speciality contractors awarded contracts on the project by Oakville.

4. At the hearing, counsel for Karvon set forth the facts he claimed were relevant to the issue of which company employed the employees in question, and these were accepted as correct by counsel for the applicant. For his part, counsel for the applicant added only that the employees 'feel' that they work for Karvon, a statement accepted by counsel for Karvon. Having agreed with each other concerning the facts they desired to put before the Board, neither counsel called any viva voce evidence.

5. Apart from the statement that the employees 'feel' that they work for Karvon, the facts agreed to by counsel primarily relate to the formal arrangements between Oakville and Karvon, and with the 'form' of the employment relationship covering the construction labourers and the project superintendent who hired the labourers and directs them in their work. These facts indicate that at least in terms of 'form' the superintendent and the construction labourers are employed by Oakville. Indeed, on the basis of the material put before us, Karvon's functions appear to be limited to performing certain routine tasks on behalf of Oakville, acting as an advisor to Oakville, and serving as a conduit through which Oakville pays its accounts.

6. In his submissions to the Board, counsel for the applicant contended that notwithstanding the formal relationship between Oakville and Karvon, and the fact that Oakville appears to have the final decision-making authority with respect to the job in question, the Board should assume that Karvon, with its expertise, in fact makes all the important decisions affecting the project, including all decisions with respect to the hiring and direction of the superintendent and the construction labourers, and that accordingly the Board should conclude that Karvon is their true employer. In determining which of two or more companies is the employer of a group of employees, the Board concerns itself not only

with form and appearances, but also with the realities of the situation. See: *Sutton Place Hotel*, [1980] OLRB Rep. Oct. 1538 and the cases cited therein. In the instant case, however, no evidence was led or facts agreed to which would establish that the realities of the employment relationship governing the construction labourers are such that the Board should conclude that Karvon is in fact their true employer. Having regard to the role that construction industry project managers usually perform, it is easy to speculate as to whether Karvon in fact has true decision-making authority on the project, and whether the project superintendent reports to, and takes direction from, officers of Karvon. However, the Board cannot act on the basis of speculation but must instead rely on the material actually put before it. *On the material before us, we cannot conclude that Karvon is the employer of the employees sought to be represented by the applicant.* Accordingly, the application is hereby dismissed.”

(Emphasis added.)

3. The application at hand was made May 28, 1982. On May 31, 1982, the Board sent Karvon by registered mail a “Notice of Application for Certification, Construction Industry” (Form 77) together with a copy of the application and other documents to be completed by Karvon and returned to the Board. The Form 77 and its accompanying form letter each contained the advice that the terminal date for the application was June 8, 1982 and instructed Karvon on the requirement to return the completed documents by that date. This is the date by which the applicant must also file its membership evidence and supporting documentation. Paragraph 8 contains the following precautionary statement set entirely in capital letters:

“If you fail to file a reply or the list of employees and documents containing signatures as set out above within the time fixed by paragraph 5 of this notice or if your reply is incomplete, the Board may proceed to dispose of the application on the evidence and representations before it without further notice to you and without a hearing.”

In accordance with the Board’s customary procedures in handling applications for certification in the construction industry, a clerk of the Board contacted Karvon on June 2nd to ascertain whether the Board’s forms had been received and whether Karvon had posted the Notice to Employees about the application, which was one of the documents sent with the Form 77. The Board’s record notes that Karvon claimed not to be the employer of the men on the job sites (set out in the application). In view of that response, notices of the application were sent individually to the employees by special delivery mail the next day, June 3rd. The Board’s clerk contacted Karvon again on June 9th to see if its reply was forthcoming. That call led to a Board Officer contacting Karvon’s solicitor later that day. The Board’s record indicates that the officer was advised that a reply would be filed. The record indicates further that the same officer contacted the office of Karvon’s solicitor twice on June 15th, once in the morning and once in the afternoon. On the second contact the officer was advised that no reply had been made. On June 17th the Board issued its decision together with the two certificates referred to above.

4. In addition to not filing a reply, Karvon failed to file a list of employees and specimen signatures. Nor was there any request from Karvon, or any other party for that

matter, that the Board hold a hearing into the application. Therefore the Board proceeded to dispose of the application without a hearing pursuant to its discretion under section 102(14) of the Act and on the facts alleged in the application, the membership evidence and Form 80, "Declaration Concerning Membership Documents, Construction Industry". While the alleged facts included the information that Karvon had three projects, 2 in Toronto and 1 in the Borough of Scarborough, the Board had no alleged facts before it with respect to who the owner of the projects was, or the relationship, if any, between the owner and Karvon. Nor were there any facts alleged to contradict the allegation implicit in the application that Karvon was the employer of the persons whom the applicant was seeking to represent. In short, this application is with respect to different projects on job sites than the first one and the Board had none of the facts which, by agreement of Local 183 and Karvon, had been before the Board, differently constituted, when it disposed of the earlier application. Had the respondent filed a reply, the situation might have been otherwise.

5. Now, a month after the Board's decision in the instant application has issued, Karvon is seeking an opportunity to have the application "... reopened so that the employer may file a reply and for a hearing so that the employer may give evidence.". Except for the statement in the second paragraph of the letter that "There has been no change in the facts given in evidence at [the hearing with respect to Board File No. 0043-82-R]...", the letter contains no specific indication of what Karvon's responsibilities are for the projects named in the application or any other specific, alleged facts which might support a similar finding in this application to that made in the earlier application.

6. The Board has stated so frequently in dealing with the matters which come before it that, in labour relations matters, time is of the essence, that it is almost trite to reiterate that statement here. Nonetheless it remains true, especially with respect to applications by trade unions seeking to acquire bargaining rights. It is particularly pertinent with respect to such applications in the construction industry because of the relatively short duration of the employment relationships which prevail in that industry. The legislature's sensitivity to that fact is evident in the construction industry provisions of the Act relating to the acquisition and termination of bargaining rights as well as in the provisions contained in the Rules of Procedure under the Act.

7. The realities of the situation are demonstrated in the Board's processing of uncomplicated applications for certification in the construction industry. These applications are usually considered by the Board on the day immediately following the terminal date for the application and, if the requisite membership support is present for certification without a representation vote, the decision and attendant certificate will usually issue that same day or the following one. Accordingly, the Board's administrative procedures are established to expedite these applications, consistent with the objectives of the Act and its Rules of Procedure. That is why a Board clerk contacts the respondent to an application to see if it has received the Board's notice and related documentation. When that contact indicated that Karvon was claiming not to be the employer of the employees affected by the application, the Board took steps to assure that those persons received individual notice of the application. Again, when no reply was received by the day after the terminal date further telephone inquiries were made by Board staff with Karvon and its solicitor to see if a reply was to be forthcoming. Notwithstanding these contacts and the clear warning set out in paragraph 8 of the Board's notice to the employer about the application for certification, no reply had been received from Karvon by June 17th when the Board issued its decision.

8. The respondent appears to be relying, at least in part, on what it claims to be confusion arising out of the Board's decision in the first application being followed by the instant application approximately 10 months later. Whatever Karvon's reasons were, it has chosen to ignore the express requirements upon it to respond to the application in a timely fashion and to ignore the clear warning emphasized in paragraph 8 of Form 77. In so doing, it was acting at its own peril and must accept the consequences.

9. There is a need for finality in the Board's decisions so that the parties affected may rely on them and in the circumstances present here in which the respondent has failed to act with due diligence when notified of this application, the Board does not consider this to be an appropriate case in which to exercise its discretion pursuant to section 106(1) of the Act to reconsider the decision which issued June 17th in this application. Therefore the request set out in the final paragraph of the letter dated July 20, 1982 from Karvon's solicitor is denied.

0043-82-U David See-Wai Wu, Complainant, v. Canadian Union of Public Employees Local 1692, Respondent, v. North York General Hospital, Intervener

Duty of Fair Representation – Unfair Labour Practice – Union giving wrong advice on time limits for filing grievance – Gross negligence amounting to arbitrary conduct – Union's subsequent conduct not rectifying initial breach of Act

BEFORE: Pamela C. Picher, Vice-Chairman

***APPEARANCES:** David See-Wai Wu on his own behalf; Brian Atkinson, Gary Dennis and Walter J. Lavigne for the respondent; Corinne F. Murray and Donna M. Gillis for the intervener.*

DECISION OF THE BOARD; August 12, 1982

1. Mr. David Wu has filed a complaint under section 68 of the *Labour Relations Act*. He maintains that following his discharge from his employment at North York General Hospital the respondent union dealt with him in a manner that was in breach of its duty of fair representation. Section 68 of the Act provides as follows:

A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

2. On January 7, 1982 Mr. Wu was suspended from his position as a porter in the food services department of the Hospital. On January 8th Mr. Wu met with Mr. Gary Dennis, the chief shop steward, to discuss his suspension and the possibility of filing a grievance. Mr.

Dennis advised Mr. Wu that he should wait to receive the documentation from the Hospital. On January 11th Mr. Wu was advised by the Hospital that Mrs. Denise Read, the manager of dietetic services, wanted to deliver a letter of discharge to him the following day.

3. When Mr. Wu went to his meeting with the Hospital on January 12th neither Mr. Dennis, the chief steward, nor Mr. Borge Westerman, another union representative with whom he had previously spoken about his situation, were at work. The Hospital, however, located a shop steward from another section of the Hospital, Mr. Wally Lavigne, and the meeting commenced with Mrs. Read giving Mr. Wu his letter of discharge.

4. The Board concludes from the evidence of the various witnesses that the meeting progressed as follows: Mr. Wu read his letter of discharge and stated that it contained three mistakes which he wanted to explain to the Hospital. Mrs. Read replied that if there were parts of the discharge letter that he did not agree with it was his right to present a grievance. Mr. Wu indicated that that was what he wanted to do and he and Mr. Lavigne then talked between themselves about the filing of a grievance. Mr. Lavigne informed Mr. Wu that he had only a few days to file a grievance. Mr. Wu though explained to Mr. Lavigne that he had to catch a train in about an hour to make an urgent trip to Chatham. He indicated that he would be back the following Monday. Of particular importance to Mr. Wu's complaint is the further evidence that Mr. Wu specifically asked Mr. Lavigne if there would be any problem with his filing a grievance in one week, immediately upon his return from Chatham. Mr. Lavigne, in his evidence, acknowledged both that Mr. Wu asked him if there would be any problem with not filing his grievance for one week and that he, Mr. Lavigne, told him there would be no problem. Mr. Lavigne acknowledged that he told Mr. Wu that he couldn't see why he couldn't be away until Monday and see Mr. Dennis, the chief steward, to discuss his grievance when he got back from Chatham.

5. The evidence reveals that Mr. Lavigne did not inform Mr. Dennis of Mr. Wu's situation following Mr. Wu's receipt of his letter of discharge. More specifically, he did not tell Mr. Dennis that Mr. Wu would be away for one week and would not be able to file a grievance until his return on January 18th. Mr. Dennis confirmed that he heard nothing about Mr. Wu's situation between his initial conversation with Mr. Wu on January 8th and Mr. Wu's return from Chatham on January 18th.

6. When Mr. Wu returned from Chatham on January 18th he contacted Mr. Dennis immediately to see if his grievance had been filed. Mr. Dennis testified that he informed Mr. Wu that because he had spent a week in Chatham immediately following the receipt of his letter of discharge his grievance would not be timely and that he would have to investigate the matter. Mr. Dennis told the Board that at that point he had heard that there was something going on in Mr. Wu's department and that when one employee had refused to do something the supervisor asked Mr. Wu to do it and he refused. Mr. Dennis stated that he tried to impress upon Mr. Wu on January 18th that by refusing to do the work he had given merit to management's position in the matter.

7. It is common to the testimony of both Mr. Wu and Mr. Dennis that on January 18th Mr. Dennis told Mr. Wu that he would look into the matter and get back to Mr. Wu in two days. Their further consistent evidence reveals that when Mr. Dennis called Mr. Wu in two days Mr. Dennis told him that they would be submitting a grievance and he would contact him again in a couple of days. Mr. Wu testified without contradiction that following this

conversation Mr. Dennis never called him back. Mr. Dennis confirmed that contrary to what he had indicated to Mr. Wu, he did not at this point file a grievance.

8. After about a week, or on or about January 28th, Mr. Wu went to see Mr. Dennis about his grievance. According to Mr. Wu, Mr. Dennis told him at that point that he could not file his grievance because he had received too many disciplinary letters. Mr. Dennis confirmed in his evidence that it was only in the early part of February or approximately a month following his discharge that he looked at Mr. Wu's file and became aware of the prior letters from the Hospital.

9. On or about February 8, 1982 Mr. Wu went to the union's offices to see a Mr. Randy Millage, a union representative to whom he had been referred by someone at the Hospital. Mr. Wu explained his situation to Mr. Millage. Thereafter, on February 11th, Mr. Millage instructed Mr. Dennis to prepare a grievance for Mr. Wu to sign for filing with the Hospital.

10. Mr. Wu's grievance was filed by the union on February 12th. Through a letter dated February 15th the Hospital denied Mr. Wu's grievance on the following basis:

February 15, 1982

Mr. David Wu
Apartment 1202
1338 York Mills Road
Don Mills, Ontario
M3A 3M3

Dear Mr. Wu:

Your grievance was left in the office of the Director of Personnel & Labour Relations on Friday, February 12, 1982.

Article 7, Grievance Procedure, in the Collective Agreement between the North York General Hospital and the Canadian Union of Public Employees, Local 1692, outlines the procedure for filing a grievance. You have not submitted your grievance within the time limits provided, therefore, according to the Collective Agreement, if there is a grievance, it has to be deemed to be settled.

Further, you have not followed the procedure outlined in the Collective Agreement, Article 7, in that you did not discuss this complaint with your Supervisor, Ms. Elaine Walker, you did not submit the grievance to your Department Head, Mrs. D. Read, and your Steward did not sign the grievance.

Accordingly, your grievance is not a proper grievance because you have failed to follow the procedure outlined in Article 7.

Yours truly,

(Ms.) Donna M. Gillis
Director of Personnel & Labour Relations

ks
cc: Mrs. D. Read
cc: C.U.P.E.
cc: Personnel

The Hospital denied Mr. Wu's grievance both because he did not follow the procedure outlined in article 7 of the collective agreement and because he did not file his grievance within the appropriate time limits. The relevant provisions of the collective agreement are set out below:

(Provisions of collective agreement omitted).

• • •

11. In an attempt to reverse the Hospital's decision, Mr. Wu prepared a letter addressed to the personnel department of the Hospital along with an explanation of what had happened on the day of his suspension. He then took them to Mr. Millage who undertook to talk the situation over with the Hospital and call Mr. Wu if he received any news. When Mr. Wu had not heard from Mr. Millage for one week he telephoned him. Mr. Millage informed him that there was nothing new and instructed Mr. Wu to call him again in another week. When Mr. Wu called back a week later he was again informed there was nothing new and was again instructed to call back in another week. When he called back a week later he was directed to call a particular union representative at the Hospital, Mr. Bill McKinnon. When Mr. Wu called Mr. McKinnon, Mr. McKinnon stated that he would make inquiries on his behalf. After three days Mr. Wu phoned Mr. McKinnon. He was told that the Hospital would not accept his grievance because it was too late and because Mr. Wu had received five previous letters from the Hospital. It was at that point that Mr. Wu filed the instant complaint alleging that the union had violated its duty of fair representation.

12. Mr. Dennis testified to the procedures regularly followed by the union for deciding whether a grievance should proceed to arbitration. He explained that the union has a grievance committee composed at the relevant time of three persons to decide whether a grievance should proceed to arbitration. Mr. Dennis testified that he and one of the other persons on the committee discussed Mr. Wu's grievance in their locker room on a break. He testified that they decided that Mr. Wu's grievance should not proceed to arbitration because there are too many points against them. Mr. Dennis acknowledged that his exchange with the other member of the grievance committee was really just a discussion and was not an official or formal meeting of the grievance committee. The evidence reveals that the third member of the committee was not given notice of or invited to the discussion. Mr. Dennis indicated that the grievance committee has regular monthly meetings where outstanding grievances are regularly discussed. Mr. Wu's grievance was not discussed at one of these regular meetings. With respect to the rationale for their decision not to process Mr. Wu's grievance to arbitration, Mr. Dennis stated that the previous disciplinary letters in Mr. Wu's file did not bear on their decision. Instead, he indicated, they were mainly influenced by the fact that Mr. Wu had refused a work assignment.

13. Mr. Dennis stated that a grievor has the right to appeal a negative decision of the grievance committee to the union membership. He acknowledged, however, that he did not inform Mr. Wu of this right.

14. Mr. Wu stated that the basis of his complaint against the union is that Mr. Lavigne led him to believe that there would be no problem if he went to Chatham for a week to attend to an urgent matter prior to filing a grievance concerning his discharge. Mr. Wu complains that as a result of being misled in this manner his grievance was denied for procedural defects

and was not considered on its merits. In contrast, the union argues that the late filing of the grievance had no adverse impact on Mr. Wu because after reviewing the merits of Mr. Wu's grievance, the union decided not to proceed to arbitration in any event.

15. A union is under a duty to represent the employees in a bargaining unit in a manner that is not arbitrary, discriminatory, or in bad faith. Mr. Wu does not suggest that the union either acted in bad faith or discriminated against him. The issue then is whether the union represented Mr. Wu in an arbitrary manner.

16. A union is not required to be correct in every step it takes on behalf of an employee. Moreover, mere negligence on the part of a union official does not ordinarily constitute a breach of section 68. See *Ford Motor Company of Canada Limited*, [1973] OLRB Rep. Oct. 519; *Walter Princesdomu and The Canadian Union of Public Employees, Local 1000*, [1975] OLRB Rep. May 444. There comes a point, however, when "mere negligence" becomes "gross negligence" and when gross negligence reflects a complete disregard for critical consequences to an employee then that action may be viewed as arbitrary for the purposes of section 68 of the Act. In *Princesdomu, supra*, the Board said at pp 464-465:

Accordingly at least flagrant errors in processing grievances—errors consistent with a "not caring" attitude—must be inconsistent with the duty of fair representation. An approach to a grievance may be wrong or a provision inadvertantly overlooked and section 60 has no application. The duty is not designed to remedy these kinds of errors. But when the importance of the grievance is taken into account and the experience and identity of the decision-maker ascertained the Board may decide that a course of conduct is so, implausible, so summary or so reckless to be unworthy of protection. Such circumstances cannot and should not be distinguished from a blind refusal to consider the complaint.

(See *John Adema*, [1979] OLRB Rep. Jan. 1 for a subsequent case citing with approval the above quoted principle.)

17. It is well established that a union is not required to take every grievance to arbitration. In deciding whether or not to take a grievance to arbitration, however, the union is required to direct its mind to the merits of the grievance and make its decision on available facts. See *Ford Motor Company Limited, supra*, *Princesdomu, supra*; *Zorzi and Nadaline*, [1975] OLRB Rep. Oct. 791 and *Antonio Melillo*, [1976] OLRB Rep. Oct. 613.

18. At the hearing, the union stated that it is mandatory under the collective agreement for a discharge grievance to be filed within three days. It is not the role of this Board in this proceedings to interpret the terms of the collective agreement. Accordingly, for the purposes of this decision we adopt the union's interpretation on this point particularly as it is an interpretation which was further accepted by the other parties.

19. In his testimony Mr. Lavigne insisted that he informed Mr. Wu at his discharge meeting that he had only a few days to file his grievance. At the same time, however, he acknowledged that when Mr. Wu specifically asked if there would be any problem with his making his urgent trip to Chatham first, he replied that there would not and that he could speak to Mr. Dennis immediately upon his return. In further describing his conversation with

Mr. Wu, Mr. Lavigne indicated that he found Mr. Wu difficult to understand and felt that they were not communicating clearly. At the hearing the Board employed the services of a translator for Mr. Wu whose first language is Chinese. Mr. Lavigne stated that at the time of his exchange with Mr. Wu about his trip to Chatham he felt that they were “miles apart in their communication”. He said, “I don’t think I was getting across to him too clearly and he was not getting across to me.” Although Mr. Lavigne acknowledged that he was aware that there were other people at the Hospital who spoke Chinese, he did not seek the assistance of anyone to insure that his communication with Mr. Wu, on the critical matter of the timely filing of his discharge grievance, was clear. It is apparent on the evidence that notwithstanding Mr. Wu’s direct inquiry, Mr. Lavigne never apprised Mr. Wu of the risk in leaving for Chatham before filing a grievance.

20. Mr. Lavigne did not suggest that he was not aware that the grievance had to be filed within three days of the discharge. The Board is compelled to conclude on the evidence that Mr. Lavigne, while fully aware of the time limits, responded to Mr. Wu’s clear inquiries about a possible risk in making his trip to Chatham in a manner that led Mr. Wu to believe that he could go to Chatham for a week and have no problem filing this grievance upon his return.

21. In the Board’s opinion the union’s communication to Mr. Wu on the matter of his trip to Chatham constitutes such disregard for its natural adverse consequences that it must be viewed as gross negligence constituting arbitrary conduct within the meaning of section 68 of the Act. The conversation must be characterized either as wilfully misleading or, focusing on Mr. Lavigne’s comment that they were “miles apart in their communication”, as reflecting a reckless disregard for whether Mr. Wu was misled or not. In a matter of such importance as the timely filing of an employees’ discharge grievance, the Board is of the opinion that a union violates its duty of fair representation if, as in this case, it leaves its communication with an employee who is specifically inquiring about possible risks in following a proposed course of conduct in a state in which the union is either aware or readily ought to have been aware that the employee, to his detriment, has been misled as to a critical consequence of his proposed act.

22. The union argues that it should not be found to have violated its duty of fair representation because the late filing of Mr. Wu’s grievance really had no adverse impact on him given that the union subsequently considered the merits of his grievance and decided not to take the matter to arbitration. The Board cannot conclude on the evidence, however, that the subsequent conduct of the union rectified the initial breach of section 68 set out above.

23. According to Mr. Dennis, the procedure regularly followed by the union to determine whether grievances should go to arbitration is for the grievance committee to review the merits of a grievance and make a decision. In this case Mr. Dennis acknowledged that Mr. Wu’s grievance was not considered at a regular or official meeting of the grievance committee or even discussed by all of the members. Instead Mr. Dennis met one of the two other members of the grievance committee in the locker room on a break during which they had a discussion about Mr. Wu’s grievance and decided that it should not go to arbitration. In discussing the investigation he made prior to deciding not to take the matter to arbitration Mr. Dennis stated that he spoke to two or three other Chinese co-workers to ask if anyone had seen what had taken place on the day of Mr. Wu’s suspension. He stated that he wanted to see what Mr. Wu was like to work with and whether what Mr. Wu had told him was true. Mr. Dennis did not state in evidence, however, what he learned or concluded from his conversations with Mr.

Wu's co-workers. He confirmed that he never discussed the matter with Mrs. Read who Mr. Wu described as his department head. Mr. Dennis further acknowledged that while he discussed the incident precipitating Mr. Wu's discharge with him following the suspension, he never again discussed the merits of the situation with Mr. Wu after the suspension was transformed into a discharge. At the meeting with the Hospital when Mr. Wu was given his letter of discharge he clearly stated to Mr. Lavigne that the letter contained three mistakes he wanted to discuss with the Hospital. The Board cannot conclude from the evidence that the union ever inquired into the nature or merit of these alleged mistakes.

24. The Board concludes on the evidence of this case that the union has not discharged the evidentiary burden which has shifted to it of establishing that its subsequent conduct nullified its initial breach of section 68. The Board is not satisfied that the union in accordance with its own procedures adequately directed its mind to the merits of Mr. Wu's complaint prior to deciding not to process it to arbitration to rectify its prior conduct.

25. For the reasons set out above therefore the Board concludes that the union violated its duty of fair representation in the manner in which it dealt with Mr. Wu following his discharge. The appropriate remedy in the circumstances of this case is, in part, to send Mr. Wu's grievance to arbitration for a hearing on the merits. (See *Ford Motor Company*, *supra*; *Leonard Murphy* [1977] OLRB Rep. March 146; *Shafickool Mohammed*, [1977] OLRB Rep. April 216; *Reginald Walker*, [1980] OLRB Rep. Oct. 1561 and *Bedard Girard Ontario* [1981] OLRB Rep. Oct. 1338).

26. Accordingly, the Board makes the following order:

1. that the respondent union forthwith submit the grievance of Mr. Wu's discharge to arbitration for a hearing on its merits;
2. that the Hospital, for its part, forthwith take the steps that are necessary for bringing Mr. Wu's grievance to arbitration
3. that the Hospital waive any preliminary objection it might have under the collective agreement that would preclude Mr. Wu's grievance from being heard on its merits;
3. that, in the event that Mr. Wu's grievance is successful and an arbitrator or board of arbitration makes an order of compensation, the union bear the burden of paying whatever compensation may be attributable to the delay caused by its violation of the *Labour Relations Act*, specifically, any compensation owing from January 18th through to and including the date of the issuance of this decision;
4. that, the respondent forthwith provide copies of the attached notice marked "Appendix", signed by the respondent's authorized representative, to the intervener employer in sufficient numbers for posting in the employer's premises;
5. that the intervener post forthwith copies of the attached notice

marked "Appendix", duly signed by the respondent's authorized representative, in conspicuous places at the Hospital where bargaining unit employees work including all places where notices to employees are customarily posted, and to keep these notices posted for 60 consecutive working days. Reasonable steps shall be taken by the intervener to insure that the said notices are not altered, defaced or covered by any other material.

27. The Board remains seized in the event that a dispute arises over the interpretation or implementation of its Order.

28. The complaint is hereby allowed.

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

WE, LOCAL NO. 1692 OF THE CANADIAN UNION OF PUBLIC EMPLOYEES, HAVE ISSUED THIS NOTICE IN COMPLIANCE WITH AN ORDER OF THE ONTARIO LABOUR RELATIONS BOARD ISSUED AFTER A HEARING IN WHICH WE PARTICIPATED. THE ONTARIO LABOUR RELATIONS BOARD FOUND THAT WE VIOLATED THE LABOUR RELATIONS ACT AND HAS ORDERED US TO INFORM ALL EMPLOYEES IN THE BARGAINING UNIT OF THEIR RIGHTS.

THE ACT GIVES INDIVIDUAL EMPLOYEES THESE RIGHTS:

TO BE REPRESENTED BY A TRADE UNION AND
TO PARTICIPATE IN ITS LAWFUL ACTIVITIES.

TO BE REPRESENTED BY A TRADE UNION IN A
WAY THAT IS NOT ARBITRARY, DISCRIMINATORY
OR IN BAD FAITH, WHETHER OR NOT THEY ARE
MEMBERS OF THAT TRADE UNION.

WE ASSURE ALL EMPLOYEES REPRESENTED BY LOCAL NO. 1692 OF THE
CANADIAN UNION OF PUBLIC EMPLOYEES THAT:

WE WILL NOT DO ANYTHING THAT INTERFERES
WITH THESE RIGHTS.

WE WILL NOT ENGAGE IN ANY CONDUCT THAT IS
ARBITRARY, DISCRIMINATORY OR IN BAD FAITH
IN THE REPRESENTATION OF ANY MEMBER OR
EMPLOYEE.

WE WILL COMPLY WITH ALL ORDERS OF THE ONTARIO
LABOUR RELATIONS BOARD.

WE WILL FORTHWITH SUBMIT MR. DAVID WU'S GRIEVANCE
RELATING TO HIS DISCHARGE TO ARBITRATION.

IF MR. WU'S GRIEVANCE IS SUCCESSFUL AND AN
ORDER OF COMPENSATION IS MADE BY THE BOARD
OF ARBITRATION, WE WILL PAY THAT PORTION
ATTRIBUTABLE TO THE DELAY CAUSED BY OUR
VIOLATION OF THE LABOUR RELATIONS ACT AS
ORDERED BY THE ONTARIO LABOUR RELATIONS BOARD.

LOCAL NO. 1692, CANADIAN UNION
OF PUBLIC EMPLOYEES

PER: _____
AUTHORIZED REPRESENTATIVE

This is an official notice of the Board and must not be removed or defaced

This notice must remain posted for 60 consecutive working days.

0525-82-U George Papadamou, Applicant, v. Canadian Union of Operating Engineers & General Workers Local 101, Respondent, v. **Silverwood Dairies**, a Division of Silverwood Industries Limited, Intervener

Duty of Fair Representation – Unfair Labour Practice – Company amalgamating subsidiary with own operation – Two operations having different bargaining units and agents – Employees of subsidiary joining company's unit having no right to dove-tail seniority – Unions' agreement to seniority arrangements not contravening duty of fair representation

BEFORE: R.O. MacDowell, Vice-Chairman.

APPEARANCES: *G. Papadamou for the applicant; V. McManus, M. O'Malley and A. Spooner for the respondent; and G.J. Weir and D. Booth for the intervener.*

DECISION OF THE BOARD; August 23, 1982

1. This is a complaint under section 89 of the *Labour Relations Act* alleging a breach a section 68 of the Act. That section reads as follows:

“68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.”

The complainant, George Papadamou, alleges that in February 1974, the respondent union (“the CUOE”) failed to properly represent him, with the result that he lost seniority credits to which he should have been entitled. Upon a consideration of the material before the Board, it is apparent that his allegation against the CUOE can have no application to February 1974. His claim, if any, relates to an agreement concluded between the CUOE and the intervener (“Silverwoods”) in or about October 31, 1980.

2. The Board must note at the outset that the evidence before it, in this matter, is far from satisfactory, and, in consequence, the Board has had considerable difficulty ascertaining the facts. Neither the CUOE nor Mr. Papadamou were represented by counsel and Mr. Papadamou had no real knowledge or understanding of the transactions leading up to his employment by Silverwoods and what appeared to him to be an unfair loss of accrued seniority rights. The union was also of little help — content in its own mind that it had not acted unfairly. The Board in this case has been left very much to its own devices in respect of both the facts and the law.

3. The chain of events leading to the present application began sometime in 1974 when Silverwoods acquired control of Valleyview Dairies Limited (“Valleyview”) which then had facilities on Pape Avenue in Toronto. The name and separate legal identity of Valleyview were apparently preserved, but, from a practical point of view, after 1974 the company seems to have been operated as a division of Silverwoods. Valleyview kept at least some of its own routes and employees, but it operated from shared facilities with Silverwoods. The com-

plainant was one of approximately 8 or 9 Valleyview employees who, in 1980, worked out of the Silverwoods' Dupont Street location. There is no evidence that by 1980 there were any other Valleyview employees.

4. The Valleyview employees were represented by the Teamsters' Union and had their own bargaining unit and collective agreement. There is no concrete evidence as to the agreement's coverage, or its terms. The agreement was not put in evidence. The employees of Silverwoods are represented by the CUOE. In 1980, their collective agreement covered the company's Toronto operations which included two separate plants: one on Norseman Street, and the other on Dupont Street. In the two plants, there were a little over 200 bargaining unit employees. At Dupont Street however, there was also the above-mentioned "bubble" of 8 or 9 employees working for Valleyview Dairies Limited with their own union, (the Teamsters), bargaining unit and collective agreement. That is how things stood in early 1980.

5. On or about March 1, 1980, Silverwoods completed transactions by which it acquired from the Borden Company Limited ("Borden's") certain milk and ice cream production and distribution facilities in various parts of Ontario, which it intended to rationalize and integrate with its existing operations. Since both companies had a variety of bargaining relationships with various unions, these events sparked a series of successor rights applications as the unions involved sought to protect or clarify their bargaining rights (see Board File Nos. 1235-80-R, 1902-80R, 0912-80-R, 0356-80-R and 0674-80-R). The details of these other applications are not relevant here, save to illustrate that situation in Toronto was by no means unique.

6. The applications of particular relevance to this case are Board Files 0356-80-R and 0674-80-R cross-applications under section 55 by the Teamsters and the CUOE respecting Borden's Don Mills plant. It will be noted that Valleyview Dairies Limited is *not* a named respondent in this application nor therefore, could it or its employees have been directly affected by the outcome.

7. The Board found that the acquisition of the Borden facilities constituted a sale of a business within the meaning of section 63 (then section 55) of the Act, and further that there was an intermingling of employees within the meaning of section 63(6). Silverwoods indicated that it intended to close down the Borden plant in Don Mills and to fully integrate its operations with Silverwoods existing facilities, transferring such former Borden employees as might be needed to its own plants on Dupont and Norseman Streets. In the circumstances, the Board determined that there should be only one bargaining unit encompassing all of Silverwoods plant operations in the city, and that there should be a representation vote to determine whether the Teamsters or the CUOE should be the employees' bargaining agent.

8. A representation vote was conducted and the CUOE won. At the time, the CUOE questioned the right of the Valleyview employees to vote — as it appears it certainly should have done because their employer was neither named nor involved in the proceedings — however, as it turned out, the CUOE won by a sufficient margin that the issue was never put before the Board for its consideration. Accordingly, the Board decision does not deal with or affect the small Valleyview/Teamsters group at Dupont Street.

9. According to the CUOE, the situation thereafter was in a state of considerable confusion and flux — not least because the Don Mills plant was both closed and subsequently

reopened. The immediate problem was to determine how to deal with the accretion to the bargaining unit of the remaining Borden's employees, and to sort out their routes and work functions so that the company's ongoing organizational changes could be accommodated with the existing bargaining relationships. The parties negotiated arrangements for severance pay for those Borden's employees who would not be retained, and agreed that for seniority purposes, those employees who were kept on, whether at the Don Mills location or elsewhere in the Silverwoods organization, would have bargaining unit seniority dating from March 2, 1980, the day they had become employees of Silverwoods by virtue of the operation of section 63 of the Act. As among themselves (since they all would have the same commencement date), it was decided that conflicting seniority claims would be resolved with reference to their years of service with Borden's.

10. As the Board has already pointed out, the successor rights declaration did not affect Valleyview or the pocket of bargaining rights which the Teamsters still retained at the Dupont Street location; however, it appears that Silverwoods concluded that the time was ripe to remove this anomaly by transferring the few employees involved to its own employment rolls. Again, the Board notes the paucity of evidence about any of this. It is clear however, that the transfer created precisely the same issues as for the Borden employees, except that the accretion to the CUOE unit did not come about as a result of a Board order modifying the bargaining unit, and the numbers were much smaller. But the problem of integration was the same. So was the parties' solution. The CUOE and Silverwoods agreed that the former Valleyview employees would also be given a seniority date of March 2, 1980, and put on the same footing as the new employees from Borden's. Once more, in order to resolve any conflicts among employees with the same entry date (March 2, 1980), it was decided that reference would be made to the employees' previous years of service with Valleyview. Thus for the former Borden's and former Valleyview employees, seniority consisted of two components: March 2, 1980, the date they became or were deemed to have become employees of Silverwoods; and their actual years of service with their former employer.

11. Mr. Papadamou claims that he had no knowledge of this arrangement, although it is difficult to understand why this might be so. In the 18 months since it was concluded, seniority lists have been posted on the employee bulletin boards on numerous occasions; moreover, at the time, the agreement was also posted and included in a newsletter sent to all employees. On the other hand, the grievor may not have been able to read it, or appreciate its significance. No objection has ever been taken by any former Borden's employee. Apart from the present complaint, no objection has ever been taken by any former Valleyview employee. This complaint arises because the complaint bid for a more desirable route and lost out to a former Borden's employee who had more seniority (i.e. with Borden's since both he and the complainant had the same nominal entry date on Silverwoods' employment rolls).

12. At the time of the transactions leading to the Board's successor rights determination and Silverwoods' subsequent decision to transfer the Valleyview employees from the subsidiary to its own employment rolls, the CUOE and Silverwoods were bound by a collective agreement which ran from April 1, 1979, until March 31, 1981. Thus, the business acquisition and any associated dislocation occurred right in the middle of the parties' collective agreement. A further collective agreement, running from April 1, 1981, to March 31, 1983, was negotiated after a six week strike in the summer of 1981.

13. The complainant contends that upon becoming an employee of Silverwoods, he

should have been credited with his full Valleyview seniority instead of being treated as a new employee. In his submission, he has been wrongfully deprived of the benefits of six years of service. The evidence, however, is that he suffered no loss in wages, pension benefits or of course, employment, and that for the calculation of benefit entitlements, his total accumulated seniority is in fact used. He was not treated in all respects as a totally new employee. For some purposes Silverwoods and the CUOE were prepared to recognize his years of service with the subsidiary company. But there is no doubt that in some respects, such as the allocation of desirable routes, the timing of vacations, and lay-offs, he is worse off than would have been the case if his years of service with Valleyview had simply been “dove-tailed” with those of the Silverwoods employees were “end-tailed” for some purposes. It is perhaps ironic to note that if the former Valleyview and former Borden’s employees had both been given “dove-tailed” rather than “end-tailed” seniority rights under the CUOE collective agreement, Mr. Papadamou would still have lost the competition with the former Borden’s employee. In any event, it is the complainant’s position that it was a *per se* breach of the duty of fair representation to treat him like a new employee “off the street” rather than recognizing and giving credit for his full years of service with a Silverwoods subsidiary.

II

14. Situations where two bargaining units are amalgamated can give rise to difficult representation questions especially when a single trade union is the bargaining agent for both groups of employees and is called upon to balance the claims of members who are potentially in conflict. In such circumstances, it is by no means clear that the section 68 duty of “fair representation” can be satisfied by simply acceding to the views of, or protecting the interests of the majority. But that is not the situation here. Mr. Papadamou and his fellow Valleyview employees were never represented by the CUOE, nor were they ever part of its bargaining unit — not even by virtue of a decision of the Ontario Labour Relations Board, which held only that the Borden’s employees became employees of Silverwoods’ as at the date of the sale, and that the appropriate long term bargaining structure should encompass all Silverwoods employees in the Municipality of Metropolitan Toronto. The Valleyview employees were employed by a subsidiary of Silverwoods, and became employees of Silverwoods quite apart from the Borden’s transaction or the Board’s decision in that matter. Their position is not much different from that of any other group of new employees who happen to be hired at the same time. Until they actually became employees of Silverwoods, they had no rights whatsoever under the CUOE collective agreement, and no right to demand that the CUOE represent them. The arrangement respecting their entry into the CUOE unit actually gave them *more* rights than they would have had if they were treated totally as new employees. Mr. Papadamou’s complaint, however, is that he was not given the same rights as a Silverwoods’ employee in the CUOE unit. He argues that he should have been treated as if he were a Silverwoods’ employee all along.

15. The Board notes that there is a respectable body of arbitral opinion which suggests that the concept of “seniority” is rooted in the bargaining unit itself, and does not accrue to persons outside the unit as an inchoate right which becomes crystallized on their entry into the unit. (See the opinion of Professor Laskin, as he then was, in *Re Federal Wire and Cable 3 UMAC 276* (1960).) On this view, managerial persons or other employees outside the bargaining unit do not “heap up” seniority rights which they can use if for one reason or another they become members of the bargaining unit. To so hold, would ignore the sacrifices

which the bargaining unit employees themselves actually sustain to achieve the various rights and privileges which their seniority gives them. In Laskin's view, it is anomalous to suggest that an outsider should automatically partake of these benefits without actually having participated in the sacrifices which made them possible. The situation of the complainant here is even weaker for, prior to being an employee of Silverwoods, he was not represented by the respondent at all, or even employed by the intervener. He was employed by a different employer, under a different collective agreement in a separate bargaining unit, represented by another trade union. There is no reason why years of service accumulated while working for Valleyview should automatically entitle the complainant to equivalent status as a Silverwoods' employee, in the CUOE unit, under the CUOE agreement.

16. The evidence before the Board is insufficient to determine whether, on balance, the complainant is better or worse off by the series of the transactions which made him an employee of Silverwoods and a part of the CUOE's bargaining unit. According to the evidence, he did not lose his job, or suffer a loss of wages or other tangible economic benefits, — although, his position relative to Silverwoods established employee complement may well have been inferior. On the other hand if he had remained employed by Valleyview, his job horizons would never have extended beyond the Valleyview bargaining unit which, on the evidence, encompassed no more than about 9 employees. By being integrated into the Silverwoods labour force, he now has job opportunities open to him which would not otherwise have been available. And, because we have no evidence of the conditions which the complainant enjoyed prior to and after the merger, we are in no position to say that, on balance, his position is inferior. Superficially, at least, it appears that while he has less seniority than he had in the small Valleyview bargaining unit, he can exercise those rights over a broader range of jobs than might otherwise have been available. And certainly, when the CUOE negotiated the terms of entry into its bargaining unit of persons previously employed by another employer and represented by another bargaining agent, I do not see any error in principle in deciding that, for some purposes, such new employees would have rights calculated with reference to their actual seniority in the bargaining unit rather than some artificially constructed seniority based upon years of service to another employer, in another bargaining unit, represented by another trade union.

17. In all of the circumstances of this case and on the basis of the evidence before us the Board cannot conclude that the respondent union has breached section 68 of the Act in its representation of the complainant.

18. The complaint is therefore dismissed.

0113-82-R Douglas C. Heino and Duane D. Reynard, Applicants, v. United Brotherhood of Carpenters and Joiners of America, Local 1669, v. T. E. Leroux Contracting Ltd., Intervener.

Construction Industry – Termination – Application pertaining to unit of carpenters and carpenters’ apprentices – Applicants not employed as carpenters on application date – Not entitled to bring termination application

BEFORE: D. E. Franks, Vice-Chairman, and Board Members E. J. Brady and B. K. Lee.

APPEARANCES: *Duane Douglas Reynard and Doug Heino for the applicant; B. W. Adams and W. Sherman for the respondent; Terry Lerous for the intervener.*

DECISION OF THE BOARD; August 20, 1982

1. This is an application for termination wherein the two applicants seek to terminate the bargaining rights of the respondent, Carpenters Union.

2. At the commencement of the hearing, counsel for the respondent trade union raised two preliminary objections to the application:

(a) the applicants lack status to bring the present application since they were not employees in the bargaining unit, namely, a bargaining unit of carpenters and carpenters’ apprentices at the time the application was made and further,

(b) they were not lawfully employed in the bargaining unit, that is, they were employed in violation of a collective agreement as set out in the *April Waterproofing* case, [1980] OLRB Rep. Nov. 1577.

3. The position taken by both the applicants and the intervener employer is that on the day of the making of the application and for the few days immediately preceding that date, the applicants were employed as part of a larger crew placing a concrete floor. Consequently, it is clear that although there were minimal amounts of carpentry work performed by them on the date of the making of the application, they were employed as labourers rather than carpenters. This is an application brought under section 57 of the Act. Section 57 subsection 2 reads in part as follows:

“Any of the employees in the bargaining unit defined in a collective agreement may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,

(a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation; . . .”

The legislation is clear, an application for termination can only be brought by employees in the bargaining unit. In the instant case, that is a bargaining unit consisting of carpenters and

carpenters' apprentices. In certification cases involving the construction industry provisions of the Act, the Board has consistently held that it will only look to the date of the making of the application as the date for determining the list of employees in a bargaining unit. See, for instance, *Keystone Contractors Limited* [1966] OLRB Rep. Feb. 821. The reasons for this rule is that it eliminates extensive arguments concerning the type of work being performed by employees who may or may not be in a particular bargaining unit. Counsel for the respondent trade union argued that in a termination case involving a construction union, the same test ought to be applied. Thus, the Board should look to the date of the making of the application and if there were no employees in the bargaining unit or if the applicants are not employed in that bargaining unit as in the present case, then they should not be entitled to bring such an application.

4. We are of the view that in cases involving construction trade unions the Board ought only to look at the date of the making of the application for termination, to determine the status of employees under section 57(2) to make that application. However, we note that in the circumstances of the present case, even if we were prepared to take a longer period of time as the relevant time to determine whether or not the employees were employees in the bargaining unit, it is clear on the representations of both the applicants and the intervener employer that we would still not view them as carpenters or carpenters' apprentices. Indeed, the list of employees in the bargaining unit filed by the respondent employer lists Mr. Heino as "a steel building erector trainee" and Mr. Reynard as an electrician. It is clear that the business of Mr. Leroux, the employer is erecting pre-engineered steel buildings and the two employees who are the applicants in this case are employed in all facets of such construction. As such they perform the work of a variety of trades from electrician through to labourer. In the circumstances, therefore, it would appear that although they, on occasion do perform carpentry work and that work would be covered by the collective agreement between the respondent trade union and the intervener employer, it is clear that they are not carpenters for a majority of their time.

5. For the foregoing reasons we would dismiss the present application for termination, and although it is not necessary to deal with the respondent's argument concerning the *April Waterproofing* case, *supra* it would seem that as a consequence of that case, the two applicants are also not employees in the unit of employees in the collective agreement between the respondent and the intervener.

2624-81-U Tim Reay, Complainant, v. Arthur L. Moore and Sheet Metal Workers' International Association, Respondents

Practice and Procedure – Trade Union – Unfair Labour Practice – Counsel raising violation of additional section by letter after hearing completed – Board not allowing new hearing or written submissions – Employee fined by union for leading unsuccessful raid attempt – Constitutional justification not absolute defence for violation of Act – Imposition of penalty not by itself intimidation or coercion

BEFORE: G. Gail Brent, Vice-Chairman, and Board Members L. Hemsworth and M. J. Fenwick.

APPEARANCES: *Barry Edson for the complainant; M. Zigler and A. Moore for the respondents.*

DECISION OF THE BOARD; August 9, 1982

1. The matter before the Board originated in a handwritten complaint filed on March 7, 1982, pursuant to section 89 of the *Labour Relations Act*. The complaint, in paragraph 4, alleged that:

On or about Nov. 13/81 and Dec. 22/81, the grievor was dealt with by Arthur Moore, Regional Director Sheet Metal Workers International Ass'n of the respondent contrary to the provisions of section 80 Article 2(b) of the *Labour Relations Act* in that he did on his own behalf or on behalf of the respondent:

Intimated the membership verbally and in a letter handed out to this Local (575) also imposed an illegal fine of \$1,000.00 against me.

• • •

3. In response to a request for particulars, counsel for the complainant filed the following:

- (a) The Complainant is and was at all relevant times an employee of Carrier (Canada) Limited, 8100 Dixie Road, Brampton, Ontario;
- (b) The Complainant was employed at all relevant times and remains employed as a stock keeper and as such, was and is represented by Sheet Metal Workers' International Association, Local 575;
- (c) On or about November 2, 1982, the International Union, United Automobile Aerospace and Agricultural Implement Workers of America, (U.A.W.) applied for certification, during the open period, to be certified as the bargaining agent for the unit represented by Local 575 (Board File #1668-81-R);
- (d) On or about November 17, 1981, the O.L.R.B. ordered that a representation vote be held amongst the bargaining unit employees

on November 24, 1982 [sic] in which said employees were asked to indicate whether or not they wished to be represented by the U.A.W. or Local 575 in their employment relationship with Carrier Canada Limited;

- (e) The U.A.W. lost the representation vote and was therefore not successful in its attempt to displace Local 575 as bargaining agent for said employees;
- (f) The Applicant was well-known to the Respondents as being a key supporter of the U.A.W. in said displacement application;
- (g) On or about December 8, 1981, the Complainant was notified by letter that he was being charged with violating the Constitution and Rituals of the Sheet Metal Workers' International Association Article 17, Section 1(F) and 1(M) as a result of his participation in the fore-mentioned application for certification of the U.A.W.;
- (h) On or about December 16, 1981, a meeting was convened to elect the officers of Local 575. The Complainant was nominated for the position of Chief Steward. He was not permitted to seek election to that office.
- (i) On or about December 22, 1981, the Complainant was advised that said charges would be heard by an International Trial Board under Article 18 of the Sheet Metal Workers' International Constitution. Edward J. Carlough, General President of Sheet Metal Workers' International Association appointed Arthur E. White, Jr., Business Representative, Local 30, Raymond F. Paterson, Business Manager, Local 235, and Robert J. Flood, Business Manager, Local 540 as members of said Trial Board;
- (j) Said International Trial Board convened at the Howard Johnson Hotel, Dixon Road and Highway 27 on Tuesday, February 2, 1982;
- (k) The International Trial Board found that the Complainant had violated Article 17, Sections 1(F) and 1(M) and fined the Complainant one thousand(\$1,000.00) dollars.

4. At the commencement of the hearing counsel for the respondent informed the Board that the parties had agreed to all the facts as set out in section 2 of the particulars save and except for paragraph (h). Counsel for the respondent also referred in his remarks to section 80(2)(b) of the Act whereupon it became apparent that there was some confusion concerning the agreement reached by the parties. After a brief recess, the Board was informed by counsel for the complainant that the complainant was not making any claim for damages and was not seeking a declaration that section 80 had been violated. He specifically informed the Board and the respondent that the initial complaint alleging a breach of section 80 was to be disregarded, that the complaint was to be treated only as alleging a breach of section 3 and section 70, and that the particulars were to be treated as the complaint. The case was heard on that basis.

5. The events which occurred prior to the hearing of evidence and submissions have been recited in detail because of the following letter which was delivered to the Board by counsel for the complainant:

Dear Mr. Aynsley:

I have just returned from a hearing before the Ontario Labour Relations Board in relation to the above-captioned matter. I acted on behalf of the Applicant in the matter. I stated in my opening remarks that the Applicant was alleging a violation of Section 3 and 70 of the *Labour Relations Act* and was not in the proceedings before the Board asking the Board to find a violation of Section 80(2)(b). I wish to request that this Board, in addition to finding a violation of Section 3 and 70, also find a violation of Section 80(2)(b) on the part of the Respondents.

I realize that my request is unorthodox and that I am altering my position somewhat, and that my request may cause some inconvenience to the parties. However, the claim that Section 80 has been violated would not involve the hearing of any further evidence on the part of the Applicant, and furthermore, the Applicant would not be precluded from alleging a violation of Section 80 in a fresh Complaint as such a Complaint would not be *res judicata*.

I am fully prepared to re-attend before the Board to make submissions on the issue should the Board so desire. I believe that the Respondents have not been prejudiced by my request because the allegation of a violation of Section 80(2)(b) arises out of the evidence already before the Board. However, should Counsel for the Respondents wish to make further submissions relating to Section 80(2)(b) or call evidence on that question, I would be fully supportive of that position. Alternatively, the Board may find it more convenient to permit written submissions in the event that Mr. Zigler does not wish to call any evidence.

Given the limited prejudice that my request may generate, and given that it would be more inconvenient to file a fresh Complaint alleging a violation of Section 80, I request that the Board permit the Applicant to request that a violation of Section 80(2)(b) has occurred with respect to the evidence adduced in today's proceedings.

Counsel for the respondent responded to the letter in this way:

We are in receipt of Mr. Edson's letter dated June 10, 1982 and have obtained our clients' instructions with respect to same.

We are instructed to advise the Board that our clients will not, under any circumstances, consent to re-opening of the hearing in this matter, either by way of continuation of hearing or by way of written submissions before the Board. In our submission, a re-opening of the hearing would be inappropriate in the circumstances and cause unnecessary inconvenience to our client.

The Applicant was given a full opportunity to present his evidence and argument at the hearing before the Board in this matter and we responded accordingly to the case which was presented. It would be contrary to the practice and procedure of the Board to permit submissions to be made after the presentation of evidence and argument by the parties and *before* a decision is reached. In our submission, it is not open to a party, particularly one acting through a solicitor, to substantially change and reshape his case because he was unhappy with the turn of events at the hearing before the Board.

We submit that the proper practice would be for the Board to reach its decision on the evidence and argument before it and, should either party be dissatisfied, counsel may then be in a position to ask the Board to reconsider its decision. The decision of the Board on the evidence before it should not be affected in any way by submissions made after the fact.

We further cannot agree with Mr. Edson's contention that the Applicant "would not be precluded from alleging a violation of Section 80 in a fresh complaint, as such a complaint would not be *res judicata*". Having chosen not to rely on Section 80, the Applicant cannot seek to have the matter relitigated on the basis of arguments which he could have advanced before the Board (see *Napev Construction Limited*, [1980] OLRB Rep. June 862 at p. 872).

Accordingly, we would ask that the Board be permitted to make its decision in this proceeding undisturbed by any further submissions by counsel.

6. The first decision which must be reached is whether the Board will grant the request made by counsel for the complainant. It is a most unorthodox request, and, given the initial statements of counsel, a most surprising one. The issues which were canvassed at the hearing were those raised by counsel for the complainant and dealt specifically with allegations that only sections 3 and 70 of the Act had been violated. An allegation that section 80 was violated would raise other issues. It could involve cross-examining witnesses for the complainant on matters which were considered irrelevant in view of the complaint as stated; it could involve hearing other witnesses and evidence which was not relevant to the complaint as stated. It would definitely involve hearing submissions on the alleged violation of section 80. In short, the request asks the Board to completely reopen the case so that the question of an alleged violation of another section of the Act can be examined. This request does not come as a result of new facts which have just come to the attention of the party making it. It does come following the express assurance of counsel for the complaint, who was in possession of all the facts, that no such allegations were being made and that no declaration of a violation of that section was being sought. There is nothing in the letter from counsel for the complainant which we can see that justifies the granting of such a request. Accordingly, the Board will consider only whether violations of sections 3 and 70 of the Act have been made out. Both counsel dealt with the question of *res judicata* in their letters. This Board will make no finding in that regard and considers that that is properly an issue to be dealt with in the context of any new proceedings which may be brought.

7. The facts in this case are relatively straightforward. The complainant has been an

employee of Carrier (Canada) Limited in Brampton for about three-and-one-half years. He is a member of the respondent union and is employed as a stockkeeper at a wage of around \$9.00 per hour. Sometime in September 1981, he became engaged in a campaign to replace the respondent trade union with the United Automobile Workers (hereinafter referred to as the UAW), and to that end, became a member of the UAW and formed a committee to have UAW cards signed. He said that he did this because he saw problems with the respondent trade union, and believed that it was his right under the Act to join the union of his choice.

8. At the time that the complainant became involved in the UAW campaign, he was a steward in the local of the respondent trade union. He had held that office for about one-and-a-half years. He resigned his office the day after the committee for the UAW was formed.

9. The complainant testified that during the course of the UAW campaign about seventy-one per cent (71%) of the bargaining unit signed UAW cards and that he was responsible for securing around 110 cards. At all material times there were approximately 220 people in the bargaining unit.

10. During the course of the campaign, the complainant made a statement at a meeting to the effect that "when the Company and the Union are in bed together, the workers get screwed". The respondent sent the following letter to all of its members:

*TO ALL BARGAINING UNIT EMPLOYEES OF
CARRIER, CANADA*

Dear Sisters and Brothers:

I thank you for your devoted attendance at our meeting on Wednesday, as a result of your positive action taken, the unwarranted RAID by the U.A.W. will not succeed.

By their action, in spite of the no raid Agreement, the U.A.W. have placed themselves in violation of the AFL-CIO Constitution, the central body of Labour in the North American Continent. Our organization has laid charges against the U.A.W. and trusts that justice will prevail.

We have over 5,000 members employed by Carrier in Canada and the U.S. You have their undivided support as well as the support of the thousands of our members who install the equipment that Carrier produces. Because of this we have been able to establish a sound and fruitful collective bargaining relationship with the Carrier Corporation for many years.

Our members will not support or install any air handling equipment made by any union who attempts to raid our membership. I am in receipt of the following telegram from S.M.W.I.A. Local Union 527:-

"We understand an election is to be held between S.M.W.I.A. and U.A.W. for representation rights at the Carrier plant Bramalea on Friday November 20th stop 80% of the work performed in Bramalea is sub-contract work from Carrier plants in Syracuse

N.Y. stop Should this vote go to the U.A.W. Local Union 527 S.M.W.I.A. will insist that this subcontract work be performed in Syracuse.”

Next Tuesday is election day; I urge you all to vote, for job security and progress. Vote for your Local Union 575 of the Sheet Metal Workers International Association.

Thanking you in advance,

I remain,
“Arthur L. Moore”

Regional Director.

One of the witnesses for the complainant, Laurie Spence, said that she took the letter as a threat to her job. She was the only witness questioned about the letter.

11. As a result of a Board order, a vote was held on November 24, 1981, and the respondent trade union received more votes than the UAW.

12. After both the UAW campaign and the vote were over, the complainant received the following letter from the respondent trade union:

Dear Sir and Brother:

You are hereby charged with violating the Constitution and Ritual of the Sheet Metal Workers' International Association Article 17 Section 1(f) and 1(m).

This action is being taken pursuant to your active participation in assisting the United Automobile Workers in their attempt to raid the membership of our Local Union 575.

You will be notified in due course of the date and location these charges will be heard.

Fraternally,

“Arthur L. Moore”.

13. On December 9, 1981, there was a meeting of the members of the respondent trade union to elect the local executive for the six-month period from December 1981 to June 1982. The election was to fill the unexpired portion of the terms of the members of the executive who had resigned. The complainant was nominated by Marcel Lafrance for the position of Chief Steward. Mr. Moore was chairing the meeting, and he ruled that the complainant could not run for office because he was a member in poor standing pending charges. When Mr. Lafrance asked the nature of the charges, the question was ruled out of order by Mr. Moore. Mr. Moore's rulings were not challenged. The election was held on December 16, 1981, at which

time Mr. Lafrance acted as a teller and signed the report of the results without adding any reservation or objection thereto.

14. The complainant received the following letters from the respondent trade union:

Dear Sir and Brother:

This is to advise you that I have appointed Brothers Arthur E. White, Jr., Local Union 30, Raymond F. Paterson, Local Union 235 and Robert J. Flood, Local Union 540, to serve as an International Trial Board to hear the charges preferred against you by Brother Arthur L. Moore. A copy of these charges are enclosed for your information.

You should be hearing from Brother White in the near future as to the time, date and place of the Trial. Brother White is Chairman of the Trial Board and will make all necessary arrangements for conducting the Trial.

Fraternally yours,

"Edward J. Carlough".

January 12, 1982

Dear Sir and Brother:

You are hereby directed to appear before an International Trial Board which will meet at the Howard Johnson Hotel, Dixon Road and Hwy. 27, Room 147, on Tuesday, February 2, 1982 at 9:30 a.m.

The Trial Board will be hearing the charges preferred against you by Brother Arthur L. Moore, Regional Director of the Sheet Metal Workers' International Association.

Failure to appear may result in the charge being dealt with in your absence.

Your attention is drawn to Article 18, Section 2(e) concerning your rights and privileges at this time.

Fraternally yours,

"Arthur E. White"

15. The complainant attended the hearing on the date set out in the notice letter. He was accompanied by an agent of his choice, Laurie Spence, who was at that time Recording Secretary of the Local. At the hearing he was asked by Mr. White if he knew the charges and they were read to him from the respondent trade union's constitution. He was then asked if he understood his rights regarding representation and his right to call witnesses. Mr. White then asked the complainant to plead to the charges. The complainant then said that as far as he was

concerned, "he had committed no crimes under the Canadian Constitution or the Labour Relations Act". The reference to the "Canadian Constitution" is not a reference to the respondent trade union's constitution.

16. During the course of the hearing Mr. Moore brought up the subject of the complainant's having approached the President of another Local of the respondent trade union concerning the UAW. The complainant spoke to that. He also requested the right to read a prepared statement and was allowed to do so. The complainant said that, during the course of the statement, Mr. Moore advised him that he was "coming close to slander" and "to watch himself". The complainant testified that he finished reading his statement and was told that it had nothing to do with the case. He said that he was asked whether or not he had arranged to bring in the UAW, and he admitted to having done it. That ended the meeting.

17. The complainant received the following letter with the Minutes of the hearing attached thereto:

Dear Sir and Brother:

Enclosed please find the results of the International Trial Board regarding your trial held February 2, 1982.

The Board finds you guilty as charged and by unanimous decision has fined you the sum of One Thousand (\$1,000.00) dollars.

You are reminded of your right to appeal under Article 19 of the Constitution and Ritual of the Sheet Metal Workers' International Association.

Faternally,

"Arthur E. White"

"Raymond F. Paterson"

"Robert J. Flood".

He had not appealed the decision through the respondent trade union's appeal procedure. He said, in essence, that he thought such an appeal would be futile. He has not paid the fine. He has not been asked to pay the fine.

18. Since the February hearing, the complainant has been nominated to run for President of the Local. Mr. Moore chaired the nomination meeting and he did not rule the nomination out of order. The complainant testified that nobody has taken any action to prevent him from running.

19. Sections 3 and 70 of the Act read as follows:

3. Every person is free to join a trade union of his own choice and to participate in its lawful activities.

70. No person, trade union or employers' organization shall seek by

intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

The Board has consistently held that section 3 is declaratory; therefore, if there is a substantive breach of the Act to be found, it must be found in relation to section 70. Section 70 deals exclusively with intimidation and coercion in relation to specific activities. It is this section, and this section alone, with which we must deal in order to determine whether the complaint succeeds.

20. The constitution of the respondent trade union was filed with the Board as Exhibit 2, and it was pointed out to the Board that there were internal appeal procedures to which the complainant could have access, even though the fine was not paid. It was argued by the respondent trade union that there was ample recourse available to the complainant through other fora and that the Board should not cast itself in the role of watchdog over internal union affairs. In *Canadian Textile Union*, [1971] OLRB Rep. Aug. 470, the Board held that it had jurisdiction to deal with allegations of actions which were contrary to the Act and to the public policy which found expression therein. Where there is arguably a violation of the Act, the Board will not defer to the internal union procedures. It is also the duty of the Board to interpret the Act and not the union's constitution; therefore, the presence of any possible constitutional justification for what was done is not determinative of the issue before us.

21. Quite frankly, the real difficulty for the complainant in this case is trying to fit the facts before us into section 70. There is no doubt that the complainant was entitled to join the UAW and to participate in its lawful activities. There is also no doubt that one of those lawful activities was to engage in a campaign to replace the respondent trade union during the relevant time. There is absolutely no evidence of any attempt by anyone connected with the respondent trade union to prevent the complainant from being a member of the UAW or doing anything which affected his ability or right to campaign on behalf of the UAW. As far as this Board knows, the complainant was not threatened, coerced or intimidated by anyone during his campaign on behalf of the UAW. The fine which was imposed upon him was not imposed upon him for being a member of the UAW, and no evidence was heard which would suggest that any attempt was ever made to get him to cease being a member of the UAW.

22. The fine which was imposed on the complainant was essentially for having tried to replace the respondent trade union with the UAW. It is possible to view it as a penalty imposed on someone for having exercised his rights under the Act; however, it is very difficult to view it on its face as being either current or prospective. That is, it was not on its face imposed to prevent him from exercising rights he was in the course of exercising rights he was in the course of exercising, or to threaten him concerning the future exercise of those rights. Obviously, when penalties are imposed, it is hoped that they have a deterrent effect and will discourage those upon whom they are imposed from repeating the behaviour for which they have been penalized; however, the question remains whether the mere imposition of a fine in the absence of any other behaviour can properly be labelled intimidation or coercion.

23. Section 70 of the Act speaks of intimidation and coercion alone, whereas section 80(2)(b) speaks of intimidation, coercion, and the imposition of penalties. Clearly then there was some recognition on the part of the Legislature that the imposition of a penalty was not

tantamount to intimidation or coercion, even though all three activities may have the result of discouraging certain behaviour. One distinction between intimidation and coercion on the one hand, and penalizing on the other is that in the latter case negative reinforcement is being applied only in part to prevent the possible repetition of a certain sort of behaviour. It is not necessary to have any real or immediate apprehension of the repetition of that behaviour. Penalties are intended primarily to try to express disapproval for past action; intimidation and coercion on the other hand, both involve an apprehension of some future, current, or continuing behaviour which is to be stopped by extreme means which are intended to limit the individual's freedom of choice. Section 80(2)(b) is reproduced below for information:

80.-(2) No trade union, council of trade unions or person acting on behalf of a trade union or council of trade unions shall,

(b) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of a belief that he may testify in a proceeding under this Act or because he has made or is about to make a disclosure that may be required of him a proceeding under this Act or because he has made an application or filed a complaint under this Act or because he has participated or is about to participate in a proceeding under this Act.

24. There is no evidence of any pattern of behaviour aimed at preventing or restraining the complainant from doing anything. There were no threats of any sort against the complainant. The evidence does not disclose that the complainant has been prevented from exercising his full rights as a member of the respondent trade union. The ruling made concerning his eligibility to run for chief steward in December was never challenged and he has since been a candidate for President of the Local. There is no evidence to show that the complainant believed or felt that he was being prevented from exercising his full rights of membership in either the respondent trade union or the UAW. In short, the evidence does not disclose intimidation or coercion, and we cannot hold that the imposition of a penalty itself is intimidation or coercion.

25. Section 80(2)(b) has already been reproduced, and we have already pointed out that it speaks specifically of the imposition of a penalty. It is possible that, had the original allegation of a breach of section 80(2)(b) been proceeded with, a violation of that section could have been made out. Because of the allegations dealt with, we are not in a position to make any determination concerning section 80(2)(b) at all. We point this out because we do not wish this decision to be misread as standing for the proposition that the Board will always condone the imposition of a penalty by a trade union regardless of the circumstances.

26. For all of the reasons set out above, the complaint is dismissed.

DECISION OF BOARD MEMBER, LLOYD HEMSWORTH;

1. The Board's decision is, as I see it, technically correct. The complaint has to be dismissed because of a misadventure in presentation.

2. Be that as it is. My concern is that, on the evidence, the acts of the complainant are privileged under the *Labour Relations Act*.
 3. In fact a major thrust of the Act is to prohibit the imposition of penalties such as those ostensibly imposed in this instance.
 4. It should be made doubly clear that the dismissal of the complaint on technical grounds must not be interpreted as an exoneration.
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2645-81-R; 2664-81-R United Food and Commercial Workers International Union Local 1000A AFL-CIO-CLC, Applicant, v. Keele-Wilson Supermarket Limited c.o.b. as **Tops Food Market**, Respondent, v. Group of Employees, Objectors.

Representation Voter – Alleged violation of silent period – Union representatives telephone calls not “propaganda” or “electrioneering” – Anonymous phone calls isolated incidents – Union having taken reasonable steps to avoid breaches of silent period – Board not setting aside vote in circumstances

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members W. H. Wightman and S. Cooke.

APPEARANCES: *Martin Levinson, Bram Herlich and Dan Gilbert for the applicant; R. F. Filion and J. Chetti for the respondent; no one appearing for the objectors.*

DECISION OF THE BOARD; August 16, 1982

1. The decision issued June 7th, 1982 by the Board, differently constituted, directed consolidation of these two applications for certification. Board File No. 2645-81-R was an application for certification with respect to the full-time employees of the respondent in Brampton, Ontario and the applicant was certified to represent those employees in collective bargaining by the Board's June 7th decision. The application in Board File No. 2664-81-R was with respect to part-time employees and students employed by the respondent in Brampton, Ontario and by agreement of the parties, the Board directed that a representation vote be held with respect to those employees. Following the conduct of the vote, the Board listed both applications to be heard on July 30th, 1982. When they came on for hearing as scheduled, no one appeared for the objectors. The applicant and respondent agreed that the only outstanding issue to be dealt with was the respondent's allegation that there had been a violation of the silent period prior to the vote taken pursuant to the Board's direction in its June 7th decision. Accordingly, this decision is with respect to Board File No. 2664-81-R only.
2. The parties agreed on May 28th to a list of eligible voters. The Board's customary notice in the Form 69 — Notice of Taking a Vote was sent to the parties on June 8 together with the Registrar's direction to the respondent to post two copies of the notice in a

conspicuous location where they may be seen and read by all eligible voters. The notice contains the following direction:

ELECTIONEERING

I direct all interested persons to refrain and desist from propaganda and electioneering from midnight of Sunday, the 13th day of June, 1982, until the vote is taken.

The Board's record shows that the eligibility to vote of three persons who appeared to cast ballots was challenged. Two were challenged by the applicant and were persons whom it had previously agreed should be on the list of eligible voters. It was the respondent's uncontested claim at the hearing that the third person also was challenged by the applicant and was a person whom the respondent had requested be added to the list. After the balloting was finished, the representatives of the parties signed the Consent and Waiver by which they agreed that the ballots cast be counted immediately and waived any objection to the regularity and sufficiency of the balloting. The ballot count revealed that a total of 41 ballots were cast. The three challenged ballots were segregated and not counted. 22 of the remaining 38 ballots were cast in favour of the applicant and 16 were cast against it. The Board's "Notice of Report of Returning Officer" (Form 70) was issued to the parties on June 17th, 1982, together with the Registrar's instructions to the respondent to post it where the employees are most likely to see it, notifying the parties (and any persons) that, if they desired to make representations as to any matter relating to the representation vote that they do so not later than June 25th. Solicitors for the respondent sent a registered letter dated June 24th, 1982 to the Board containing allegations that the Registrar's direction to refrain and desist from propaganda and electioneering had been violated and, as a result of those violations, the application should be dismissed. The respondent sought a hearing before the Board to present evidence and argument about its allegations. A second registered letter dated July 14th, 1982 was sent to the Board alleging that a further violation of the Registrar's direction had occurred.

3. It was because of these allegations that the Board scheduled a hearing on July 30th. At the hearing, the Board directed that witnesses be excluded at the request of the applicant. The Board heard the submissions of the parties on the preliminary objections of counsel for the applicant that certain of the violations alleged by the respondent did not satisfy the requirements of section 72 of the Board's Rules of Procedure. Ultimately the parties agreed to certain facts essentially as alleged in the two letters from the respondent's solicitors. The Board also has before it the applicant's uncontradicted admission that Mr. Les Dowling, a representative of the applicant conducted the organization campaign which led to both applications for certification. Additional evidence was adduced through the testimony of Dan Gilbert who has been president of the applicant for approximately twelve years and who testified at the hearing on its behalf.

4. The facts agreed to by the parties are as follows. During the evening of Monday, June 14th, 1982, the first day of the silent period, an eligible voter was called at home by Les Dowling, a representative of the applicant. Dowling asked the employee to give him the names of employees who had attended a meeting with management on the previous Thursday evening. Some names were given to Mr. Dowling by the employee. During the evening of Wednesday, June 16th, two eligible voters received telephone calls at home from an unidentified male. Obviously, it is not known whether it was the same caller in each incident. One of the voters was told by the caller to "go out and vote for the union". The other was told

“vote tomorrow for the union or else”. On the date of the vote the wife of an eligible voter received a call at home from an unidentified female who told her to tell her husband not to forget to come out and vote. Also on the date of the vote, a part-time employee named Deedee Ryan, a known supporter of the applicant, called another part-time employee at home and asked her if she had gone to vote. A representative of the respondent learned of one of the anonymous phone calls on the date of the vote and immediately reported the information to the Board’s Returning Officer who was there to take the vote. The two anonymous telephone calls and Ryan’s telephone call did not come to the respondent’s attention until after the representation vote had been held.

5. Dan Gilbert testified that he was the chairman of a meeting of employees held Sunday evening, June 13th, at a Brampton hotel. The meeting had been called by mailed notices sent to all full-time and part-time employees of the respondent. Approximately 40 employees attended the meeting, but Gilbert could not say how many from each category attended. The Board’s record shows that there are approximately 100 employees in the two bargaining units. Gilbert told the meeting that, as of midnight, neither the applicant nor the respondent could solicit support in any way and he stressed “in any way”. He cautioned the employees not to solicit support in any way for the applicant. Gilbert was unaware of Dowling’s call to one of the eligible voters. Nor could he tell the Board whether, at the Sunday meeting, he had been told about the meeting of management and employees on Thursday, the week prior to the vote.

6. Counsel for the respondent contends that each of these individual incidents constitute a per se violation of the silent period and that collectively they are repeated and persistent attempts to contact employees which constitute a pattern of conduct intended to influence the outcome of the vote. Counsel argues that these incidents are obvious attempts to influence the vote and, in light of the relative closeness of the vote (counsel suggests that the three votes challenged by the applicant indicate the true outcome would have been 22 votes for the applicant and 19 votes against), cast serious doubt on whether the vote represented the true wishes of the part-time employees. He asked that the Board disallow the vote and conduct a second one in order to obtain their true wishes. To this end, counsel is relying on the Board’s decisions in: *XDG Limited*, [1975] OLRB Rep. 963, as authority that a deliberate violation of the silent period by a representative of the applicant trade union will cause the vote to be set aside and a new vote to be directed; *Anderson Metal Industries Inc.*, [1981] OLRB Rep. April 415, at paragraph 9, as authority for the purpose underlying the Registrar’s direction that there be no propaganda and electioneering during the seventy-two hours immediately preceding the vote; *Treco Machine & Tool Ltd.*, [1981] OLRB Rep. Oct. 1503 for the proposition that rank and file members of the bargaining unit are interested persons as referred to in the Registrar’s “no propoganda and electioneering” direction as well as for the standard by which the Board determines whether there has been a violation of the silent period when the persons alleged to have violated it are not under the control of the party which stands to benefit from the alleged violation; and *Tend-R-Fresh Plant Co-operatives of Ontario*, [1977] OLRB Rep. Jan. 22, for the proposition that unidentified persons may be interested persons referred to in the Registrar’s direction who may engage in conduct intended to influence the vote.

7. The authority for the Registrar’s direction quoted at paragraph 2 above and customarily contained in the Form 69 — Notice of Taking a Vote is clause j of section 68 of the Board’s Rules of Procedure which state as follows:

Where the Board directs the taking of a representation vote and refers the matter to the registrar, the registrar may, subject to the provisions of the reference,

- (j) direct all interested persons to refrain and desist from propaganda and electioneering during the day or days the vote is taken and for seventy-two hours before the day on which the vote is commenced.

It is to be noted that the words "... refrain and desist from propaganda and electioneering. . . ." which appear in the Registrar's direction are the same words as are used in clause j of section 68. While it is clear that the Registrar has discretion whether to issue the direction, it is customarily, if not routinely, included in the Form 69 notice. The period during which it is prohibited to engage in propaganda and electioneering has come to be known as the "silent period" before a representation vote. In spite of the suggestion inherent in that term that interested persons are prohibited from speaking with one another, as the Board noted in *Anderson Metals, supra*, at paragraph 14, the wording

does not prohibit all communication among employees; it only precludes *propaganda* and *electioneering*, in order to allow employees an opportunity for reflection during a period in which they will not be subjected to persuasion."

(emphasis added)

So the question with which the Board is concerned is whether persons interested in the vote have engaged in the prohibited activities of propagandizing or electioneering. In this respect, it is helpful to refer to the meanings of the words "propaganda" and "electioneer" in Webster's New Collegiate Dictionary:

propaganda(n):

- (2) the spreading of ideas, information, or rumor for the purpose of helping or injuring an institution, a cause or a person;
- (3) ideas, facts, or allegations spread deliberately to further one's cause or to damage an opposing cause.

electioneer (v.i.):

to take an active part in an election; to work for the election of an candidate or a party.

8. The Board's decision in one of its more recent cases dealing with alleged breaches of the Registrar's direction, *Treco Machine, supra*, reviews the purpose of the direction as well as the standards which the Board has applied when the violations alleged are the actions of rank and file employees of the employer. The Board was dealing with an allegation that one of the trade union's supporters, Mr. Egbert Thomas, in an application for certification in which a pre-hearing representation vote had been held had violated the "silent period". Thomas was alleged to have been responsible for the circulation of a rumor to the effect that employees' job

security would be affected by the way they cast their votes. The Board found that Thomas had ceased to be an employee for whose actions the trade union was directly responsible and dismissed the employer's claim that Thomas' actions entitled the other employees to a new vote. The Board then went on to deal with the employer's claim that violation of the Registrar's prohibition by a rank and file employee (Thomas) was a violation by an "interested person" entitling employees to a new vote. In dealing with that issue, the Board set out at paragraphs 7, 8 and 9 of the decision the purpose of the Registrar's direction and the standards to which the Board looks when seeking to determine whether there has been a violation of that direction.

7. It is the second branch of the respondent's argument that is the more perplexing, underscoring as it does the problems of control and enforcement which arise out of the imposition of the 'silent period' by the Board. The purpose of the 'silent period' has been reiterated in a long line of Board cases, the most recent being *Anderson Metal Industries Inc.*, [1981] OLRB Rep. April 415, at paragraph 9:

Its primary object is to ensure that, so far as possible, the vote will be conducted in an atmosphere of calm and that the employees who are to participate in the vote shall not be subjected to partisan pressures and influences as the voting day approaches. The Board's view has always been that at that point the individual employees should be left free to make a purely personal decision as to how he should vote.

The Board in *Wackenhut Security*, [1975] OLRB Rep. Oct. 738, made it clear that the prohibition can extend to all forms of propaganda, and that the result of a violation will in each case depend upon an assessment of all of the relevant circumstances. Particularly where, as here, the alleged propagandanda goes to the heart of the employment relationship and job security, the circumstances surrounding it must be closely scrutinized by the Board.

8. In the present case, the Board is satisfied that the applicant has taken reasonable steps to ensure the observance of the "silent period" by its supporters, and that the actions of Mr. Thomas here in dispute were outside of the applicant's control. This raises some hard issues for the Board. To what extent are incidents of this kind to result in a successful party losing the benefit of an election victory, and the necessity of a further vote taking place? Is it appropriate to expect compliance with the Registrar's direction by employees acting outside the control of either party? Is it necessary to attempt to monitor the informal conversations between employees in the days preceding a vote on the very subject which is likely to be uppermost in their minds at that point?

9. The Board has grappled with these problems in the past, and has developed a policy which neither gives to such informal activities a weight out of proportion with their true impact, nor, on the other hand, creates a licence for the parties to do indirectly what they cannot do

directly. In *Royal Hotel*, [1981] OLRB Rep. Aug. 1174, the Board stated at paragraph 7:

... We find it difficult to characterize a conversation between three employees in the bargaining unit [at a party] on the Saturday evening prior to a representation vote as campaigning within the meaning of the term campaigning which is prohibited by order of the Registrar in a representation vote.

At the same time, the Board from its earliest cases has left no doubt that employees in the bargaining unit were 'interested persons' within the meaning of the Registrar's direction, and that a violation by one of them of the silent period *could* result in vitiation of the election. See *Ontario Steel Products*, [1961] OLRB Rep. Aug. 174; and *International Nickel Company Limited*, 62 CLLC ¶16,257. The position of the Board is well summarized in *Kimberly-Clark Limited*, [1977] OLRB Rep. Sept. 599, at paragraph 9:

Obviously, it would unduly prejudice the parties to a representation vote if the vote could always be automatically invalidated by virtue of breaches of the silent period by persons whose conduct is beyond the parties' reasonable control. Having found a disregard of the silent period the Board therefore must ask whether the party concerned took reasonable precautions to avoid or prevent any breach. If it is satisfied that the party has exercised the necessary care and that the breaches are neither so serious nor so widespread as to call into question the results of the vote, the Board will allow the vote to stand. Where it is found that isolated infractions are the work of rank and file employees who are not under the control of the union and that the union did all that can be reasonably expected to prevent those breaches, the Board may decide not to disturb the vote. (*Rheem Canada Limited*, [1965] OLRB Rep. July 284; *Marsland Engineering Limited* [1972] OLRB Rep. Dec. 1009.)

See also *Tend-R-Fresh Plant*, [1977] OLRB Rep. Jan. 22. The Board, in order [sic] words, applies its usual test of whether the impugned activity 'was likely to and intended to influence the result of the vote' (*Ontario Steel Products*, *supra*), taking into account that the statement is made only by a rank-and-file employee.

9. The instant case is not one just involving rank and file employees as persons interested in the vote, it involves Les Dowling, the representative of the applicant who conducted the organization campaign and Deedee Ryan, a known supporter of the applicant. There can be no doubt that Dowling is a person for whose actions the applicant was directly responsible and Ryan might be such a person. Where a person in Dowling's relationship to an applicant fails to observe the Registrar's prohibition, there is no doubt that the Board will set aside the vote and order a new one. The Board in *XDG Limited*, *supra*, was dealing with circumstances where a union official accepted an invitation to meet informally with a group of employees in the bargaining unit during the silent period. In the process of meeting with them,

he answered various questions about the type of working conditions and benefits which they might enjoy were the applicant to represent them in collective bargaining with the employer. The Board found this conduct to be "... a direct infringement of the 'silent period' in that he did engage in propaganda and electioneering during this period." The Board went on to direct that a new representation vote be taken.

10. Dowling's impugned conduct was to call an employee on the first day of the silent period to seek information from the employee about the identity of other employees who had attended a meeting with management on the previous Thursday evening. In Ryan's case, it was to call another eligible voter at home on the date of the vote and ask if she had gone to vote. Dowling's telephone call to an employee is neither propaganda nor electioneering. Ryan's call may satisfy the meaning of electioneering which would derive from the meaning given to "electioneer" in *Webster's, supra*. The purpose of the "silent period", however, is to avoid employees being subjected to partisan pressure and influence. It seems to the Board that a query from one employee who is a known supporter of the applicant to another employee about whether that employee has been to vote, does not constitute partisan pressure and influence. Therefore, Ryan's conduct standing alone is not cause to negate the election and call another one. That being the case, the same must said of the anonymous telephone caller, who, on the date of the vote, spoke to the wife of an eligible vote and told her to tell her husband not to forget to come out and vote.

11. This leaves the two remaining, separate, anonymous telephone calls made to two eligible voters the evening before the vote. The calls obviously cannot be attributed either to employees in the bargaining unit or to the parties to the application. The Board knows only that the caller was male and there is no evidence as to whether it was the same person who made each call. Both calls exhorted the recipient to vote for the union. One of the calls ended with the ambiguous threat "or else". There can be no doubt that the two calls were a form of electioneering and made for the purpose of attemptation to influence the outcome of the vote, either by getting the two eligible voters to vote against the union or for the mischief of creating a violation of the prohibition against electioneering so as to cause a new vote to be held. Are these two incidents sufficient cause for the Board to disregard this vote and direct a new one? The Board thinks not in the circumstances before it.

12. The union took the precaution of holding a meeting the night before the start of the silent period of both the part-time employees directly affected by the vote and the employees in the bargaining unit which the Board had already certified. The employees were told that they must not solicit support for the union in any way. While the Board has found the two anonymous telephone calls to be electioneering, those incidents do not represent widespread breaches of the prohibition against electioneering, nor are they so serious of themselves that they call into question the vote results. Even if the two eligible voters who were the recipients of the calls heeded the directions of the callers, the vote was not so close that a reasonable possibility exists for the outcome of the vote being influenced by those two breaches of the Registrar's direction. The vote was 22 for the applicant and 16 against. The evidence of the breaches is limited to two voters being exposed to possible influence. There is no evidence that the calls were anything but two isolated incidents or that any other employees were subject to the same kind of electioneering. Even if the Board were to accept, and it does not, respondent's counsel proposition that the three segregated ballots should be treated as votes against the applicant, thus reducing the margin of its win to three ballots, the applicant would still have sufficient support remaining to win the vote. In the Board's decision in *Tend-R-Fresh, supra*,

the Board directed that a new representation vote be held and in so doing, took into account the relative closeness of the result of the first vote which was 30 votes for the applicant and 26 against it, or a difference of 4. In that case, the impugned conduct took place while the vote was in progress. One voter on the way to the polls was subjected to comments by other employees derogatory of the union and to calls from them to vote against it. Another voter was in the process of marking his ballot when he was subjected to anonymous calls from outside of the polling area to vote no. While the Board did not have evidence which allowed it to conclude that the remarks overheard by the voter who was marking his ballot were also overheard by others, there clearly was the risk that those remarks as well as the shouts directed at the other voter might have been overheard by still other voters. That is not so with the telephone calls in the instant case.

13. The Board is satisfied that the applicant has taken reasonable precaution to avoid breaches of the Registrar's direction by persons beyond its reasonable, direct control. There is no evidence that the two anonymous calls were anything more than two isolated infractions. Nor is there any evidence that they were the work of anyone other than rank and file bargaining unit employees, or were perpetrated by persons under the direct, reasonable control of either party to the application. In these circumstances and having regard for the facts set out above, the Board is not satisfied the two calls are likely to have influenced the outcome of the vote.

14. Counsel for the respondent has contended that all of these events constitute a pattern of conduct designed to influence the vote. To this end, he contends that the Board should infer that Dowling's conduct in calling an employee during the silent period, demonstrates a clear intent to call other employees during that period. He further asked the Board to draw an adverse inference from the fact that Dowling was present for the hearing and did not testify, that his evidence would have been unfavourable to the applicant's case or would have supported the respondent's allegations. As a matter of clarification, the Board notes that Dowling, as a potential witness, was excluded by the Board's order at the commencement of the hearing. The Board did draw such adverse inference in the *Anderson Metal* decision, *supra*. That was a case where the most senior official of the union was present at the vote for the purpose of counting the ballots. He was not a scrutineer. The Board found that he had spoken to employees for at least five minutes while the balloting was taking place. There was no evidence of what he had said, but since he was the highest official of the trade union and had failed to explain his conduct to the Board, it was prepared to draw the inference that he had breached the prohibition about propaganda and electioneering. In our case, the Board is being asked to infer that Dowling intended to talk to employees other than the one he called and that he intended to do so as part of a campaign to influence the outcome of the vote. Absent any evidence to support the suggestion of an organized campaign and having regard for the fact that Dowling's call to the one employee was on a subject matter which had nothing to do with propaganda or electioneering, the Board simply is not prepared to draw the double inference sought. Therefore the Board does not find the three anonymous telephone calls, together with those of Dowling and Ryan, to constitute a pattern of conduct intended to influence the outcome of the vote.

15. In the result, the Board declines to direct that a new vote be held.

16. The Board finds that more than fifty per cent of the ballots cast were cast in favour of the applicant.

17. A certificate will issue to the applicant.

18. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.

19. The concurring opinion of Board Members W. H. Wightman and S. Cooke will follow.

2714-81-R International Beverage Dispensers' and Bartenders' Union, Local 280, Applicant, v. **Vivace Tavern Inc.**, Respondent.

Sale of a Business – Whether purchase of location and assets to expand purchaser's existing business or sale of a business – Whether character of business acquired substantially changed – Whether respondent bound by predecessor's collective agreement

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members J. A. Ronson and S. Cooke.

APPEARANCES: *Elizabeth McIntyre and Joe Leithwood for the applicant; D. B. Black, Q.C. for the respondent.*

DECISION OF THE BOARD; August 11, 1982

1. This is an application under section 63 of the *Labour Relations Act* in which the applicant alleges that the respondent is the successor employer as a result of an alleged sale of a business known as the New Hollywood Tavern from John Mitchell to the respondent. The applicant seeks a declaration that the respondent is bound, as a successor employer, by the collective agreement which it alleges was in existence between the applicant and the New Hollywood Tavern at the time of the sale. The respondent denies that it is the purchaser from John Mitchell in a sale of a business within the meaning of section 63. In the alternative, should the Board find that the respondent is the purchaser in a sale within the meaning of section 63, it seeks a declaration pursuant to sub-section 5 of section 63 terminating the bargaining rights of the applicant because the business has changed its character so as to be substantially different from the business of the predecessor employer. The relevant sections of the Act provide as follows:

63.-(1) In this section,

- (a) "business" includes a part or parts thereof;
- (b) "sells" includes leases, transfers and any other manner or disposition, and "sold" and "sale" have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the persons to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 14 or 53, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 14 or 53, as the case requires.

(5) The Board may, upon the application of any person, trade union or council of trade unions concerned, made within sixty days after the successor employer referred to in subsection (2) becomes bound by the collective agreement, or within sixty days after the trade union or council of trade unions has given a notice under subsection (3), terminate the bargaining rights of the trade union or council of trade unions bound by the collective agreement or that has given notice, as the case may be, if, in the opinion of the Board, the person to whom the business was sold has changed its character so that it is substantially different from the business of the predecessor employer.

2. On February 12, 1982, the respondent acquired the real property and chattels of 689 The Queensway known as the Hollywood Tavern. The Board notes that the application refers to the premises as the New Hollywood Tavern. Many of the documents in evidence, however, used the term Hollywood Tavern as did most of the witnesses who testified at the Board's hearing. The Board will refer to the premises as the Hollywood Tavern for purposes of clarity. The respondent continued to operate the business in the name of the Hollywood Tavern from that date until the week prior to March 25th, at which time the business was closed, to be reopened on March 25 as the House of Lancaster. It has been operating under the name of House of Lancaster since the reopening. The parties are agreed that Mitsiou Holdings Limited ("Mitsiou") was the holder and operator of the premises and John Mitchell, a principal of Mitsiou, operated the business until the week before the respondent took over. According to Theodore Koumoudouros, the business was operating on February 12th when he acquired the real property and chattels and was being operated by Alek Korn whom Koumoudouros referred to as the mortgagee in default. The uncontradicted evidence of the applicant is that Korn had been operating the business for five days. The evidence with respect to the transfer of

the two liquor licences was that they had been transferred to Korn for that interim period and then to the respondent on February 12th. It appears to the Board from this evidence and the evidence, *infra*, tracing the transfer of the real property at 689 The Queensway, that Korn either was mortgagee in possession or, as guarantor of the mortgage at issue, was acting on behalf of the mortgagee in possession when the respondent took possession of the premises.

3. The real property and chattels at 689 The Queensway were acquired in accordance with an Agreement of Purchase and Sale between the respondent as purchaser and Jerry Norman Birenbaum and Howard Steinberg as vendor, Birenbaum and Steinberg being solicitors in trust acting under the power of sale pursuant to a mortgage. At that time Mitsiou was the sole owner of the real property, subject to the power of sale held by Birenbaum and Steinberg. Mitsiou had first acquired an interest in the property in November 1979 together with a numbered Ontario company as partner. It became the sole owner in August 1981 when it bought out the partner. Sometime between August 1981 and February 11th, 1982, Mitsiou defaulted on its mortgage and Birenbaum and Steinberg acted under their power of sale to sell the property to the respondent. Title to the land and premises transferred to the respondent on February 11th, 1982 for the total consideration of \$730,000.00, all of which was ascribed, for purpose of the land transfer tax, to the value of the land, building, fixtures and goodwill. While no value was attributed for that purpose to the chattels acquired, the Agreement of Purchase and Sale includes, in addition to title to the land and premises, any right that the vendor may have in, *inter alia*, all equipment, machinery, furniture, cutlery, glassware and generally all other items currently on the premises and necessary for the operation of the business. The Agreement included as well the right to use the name "Hollywood Tavern". Koumoudouros disclaimed any need for or interest in any of the chattels and fixtures, but his own evidence indicates that he in fact received, used and continues to use many of the items listed in the "Inventory of Chattels and Fixtures" which is Schedule "A" to the Agreement of Purchase and Sale. The respondent accepted, along with title to the property, the obligation to comply with a number of outstanding work orders from various departments of the Borough of Etobicoke. In a separate transaction, the respondent purchased the inventory of beer and spirits for \$2,000.00 from Alek Korn.

4. The Hollywood Tavern held a dining lounge license, a lounge license and an adult entertainment license. The Agreement of Purchase and Sale was conditional on the respondent being able to acquire these licenses. It did acquire by transfer the dining lounge and lounge licenses, but the entertainment license was not transferrable and in that case, the condition was that the respondent's application for an entertainment license be accepted by the appropriate municipal authority. According to Koumoudouros, that was the most important license of the three because, without it, he could not carry on the type of business that he planned for the newly acquired location.

5. When Mitsiou was the operator of the Hollywood Tavern, it employed two persons as bartender/waiter, one waiter, some part-time waitresses and a cleaner. The respondent continued to employ these persons, but the two who were bartender/waiter became bartenders only, the waiter worked for a while and quit and two of the part-time waitresses became full-time waitresses and it appears that two continued to work part-time. In addition the respondent hired one more full-time bartender and two new busboys. There is no doubt that the respondent sought to instill a higher quality of service to the customers by the bartenders, waiter and waitresses, but their work remained primarily that of preparing and serving alcoholic beverages.

6. The respondent has operated a restaurant and tavern business in the name of the House of Lancaster since 1972. In 1976, the House of Lancaster introduced a burlesque-type of entertainment, using female dancers who performed in the minimum costuming permitted by law and when they were not dancing, they served alcoholic beverages to the customers. When they were serving customers as waitresses, they were clothed or unclothed in the same manner as when they were dancing. The business closed in May of 1980 because it lost the right to occupy the premises. The respondent sought a new location for the business. The critical requirements of a new location were that it have appropriate, transferable liquor licenses and an adult entertainment license, the existence of which would allow the House of Lancaster to apply for a similar license. The respondent first looked at the Hollywood Tavern in March 1981, but no deal was concluded. It bought another location conditionally, but the sale was not finally concluded because of problems with respect to the entertainment license. Koumoudouros told the Board that, all this time, he was looking for premises in which he could continue the business of the House of Lancaster.

7. Counsel for the respondent asks the Board to pay close attention to the plain meaning of the words in subsection 2 and 3 of the section 63 “where an employer . . . sells his business, . . .”. These words, he contends, require that the business being sold be the business of an employer. Counsel argues that the facts concerning the transaction before the Board in the instant case, particularly those with respect to the conveyancing of the real property, cannot be brought within the requirements of the quoted words. Counsel takes the position that the “business” was operated by Mitsiou and that the vendors were two solicitors in trust, Birenbaum and Steinberg. He claims that the latter fact is demonstrated by the chain of events beginning with the transfer of interest in September 1972 from Korn Hotels (Queensway) Limited to Marvin Arnold Goldberg and, following that, Goldberg transferred an interest in November 1979 to Jerry Norman Birenbaum and Howard Steinberg, solicitors in trust who subsequently transferred their interest to the respondent as set out above. Alek Korn was a guarantor of the charge acquired by Goldberg. From that chain of events, which is supported by the evidence before the Board, counsel concludes that the real property transferred from Korn to Goldberg to Birenbaum and Steinberg and finally to the respondent. Therefore the sale of the real property, the principal asset and the only one which the respondent was interested, was between parties separate and apart from Mitsiou who was the employer of the employees affected and the operator of the business. It is contended that even the extended definition of sale in the Act is not enough to encompass this transaction.

8. Counsel does admit the presence of some of the indicia of a sale. The respondent acquired limited, or a bad title to chattels and accepted the risk of these being claimed by creditors of Mitsiou because they were of little worth to the respondent. There was a sale of whatever interest the mortgagees in default have in the name of the business, Hollywood Tavern, a name which the respondent was not intending to use and in fact ceased using on and after March 25th, 1982. There was a transfer to the respondent of two liquor licenses, but not the adult entertainment license which was not transferrable. Finally, there was a transfer of some of the employees of the predecessor employer, but this was a voluntary action of the part of the respondent and it was, in counsel’s view, under no obligation to continue to employ these persons. Counsel asserts, on the other hand, that a number of significant indicia of a sale were absent. There was no contractual transaction between Mitsiou and the respondent with respect to the transfer of the business, in other words the operation of the tavern and restaurant business. There is no sale of goodwill and no undertaking of the predecessor not to compete with the respondent. Nor was there any contractual provisions for the sale and purchase of the beverage inventory which the respondent acquired from Alek Korn.

9. Finally, counsel for the respondent points out that the total purchase price of \$730,000.00 was attributed wholly to the real property for purposes of payment of the land transfer tax because the title to the chattels was uncertain and the vendors may or may not have owned them, besides which the chattels were of no worth or consequence to the respondent and it was immaterial whether he obtained them as part of the transaction for the real property.

10. Counsel asked the Board to conclude that these facts establish that the respondent got precisely what it was after from the start; that is a "location" to which he could transfer his pre-existing successful business, the House of Lancaster. In other words, out of the transaction the respondent obtained the land and buildings, the essential physical assets, together with the liquor licenses. Thus the respondent has bought a location for his business and that transaction does not constitute a sale of a business within the meaning of section 63.

11. Were the Board to agree with counsel's argument that there has been no sale within the meaning of section 63 of the Act between Mitsiou and the respondent, it would be closing its eyes to what has, in fact, taken place. On February 12th, 1982, the respondent stepped in and took over operation of the restaurant and tavern business of the Hollywood Tavern and continued to operate it for five weeks before closing it for a week and re-opening as House of Lancaster on March 25th, 1982. In so doing, the respondent employed most of the same persons who have been employed by Mitsiou, operating under the liquor licenses which had been transferred from Mitsiou to Korn Hotels (Queensway) Limited and on February 12th to the respondent. Under the terms of the Agreement of Purchase and Sale between the respondent and Birenbaum and Steinberg, the respondent was entitled to use and did use the name Hollywood Tavern and to make use of all of the chattels remaining in the premises. The chattels included such items as some 160 tables and 400 chairs, glassware, bar equipment and other fixtures and equipment associated with the operation of the business. The respondent was also entitled to use and did use the kitchen equipment necessary for the preparation and serving of food and retained the same food concessionaires who had been providing the essential food service when Mitsiou was operating the tavern and restaurant business. While the respondent acquired the beverage inventory in a separate transaction with Alek Korn, having regard to all of the facts before the Board, this transaction is clearly part and parcel of a type of transaction for which section 63 is designed. There can be no doubt in these circumstances that there has been a continuation of the business of the Hollywood Tavern on and after February 12th, 1982 until it closed the week prior to March 25th. The question is whether that continuation resulted from a sale of the business within the meaning of the Act from Mitsiou to the respondent.

12. While counsel for the respondent was careful to trace the conveyancing of the real property from Korn Hotels (Queensway) Limited through to the respondent to the exclusion of any part by Mitsiou and while this may be an accurate interpretation of the evidence from the standpoint of commercial law, it ignores at least one significant fact in terms of section 63. It was the respondent's own evidence that Mitsiou acquired an interest in the real property in November 1979 in partnership with a numbered Ontario company and in August 1981 acquired that partner's interest. The evidence is unequivocal that Mitsiou was at that time the sole owner of the real property, but subject to the power of sale held by Birenbaum and Steinberg pursuant to the charge which they acquired from Goldberg in November 1979. The parties are agreed that Mitsiou defaulted on its mortgage and it is common ground that, as a result of its default, Birenbaum and Steinberg were exercising their power of sale when they sold the real property to the respondent. Thus Mitsiou's interest in the property was conveyed

to the respondent by the exercise of that power of sale. The inter-position of a third party in such a transaction previously has been found by the Board not to be relevant as long as a transfer takes place. (*Marvel Jewelry Ltd.*, [1975] OLRB Rep. Sept. 733). Thus the Board is satisfied that the transfer to the respondent from Birenbaum and Steinberg of the real property, together with whatever interest they had in the chattels and fixtures, constitutes a sale by Mitsiou to the respondent and the Board so finds.

13. While the respondent may choose to disavow any interest in or attach any importance to the chattels which had been made part of the sale, and to characterize the entire transaction as merely the acquisition of a real property and location for his existing business, the conveyancing documents and other facts purport the transaction to be more than a sale of assets. Whether or not the respondent acquired clear title to the chattels, their acquisition and use allowed the uninterrupted operation of the business from the time he acquired it on February 12th until closed as aforesaid. Of even greater significance, the Agreement of Purchase and Sale purports to convey to the respondent "Any right the vendor may have to the use of the name *Hollywood Tavern*." and "Any right and interest the Vendor has or may have in the existing liquor licenses of the Hollywood Tavern." The respondent attached great importance to the licenses, particularly to the adult entertainment license, since no new entertainment licenses are being issued in Metropolitan Toronto and the respondent was dependant upon the predecessor's previously acquired rights in having an application for such a license accepted. The transfer of the two liquor licenses avoided the delay of the normal waiting period for new licenses and allowed continuity of the business without interruption. The right to use the name Hollywood Tavern meant that the respondent could continue the business "as is" without risking tarnishing the name House of Lancaster until he was ready to carry on the style of business he believes that name to represent. In addition, the respondent continued the same food operation with the same concessionaires, an operation essential to the dining lounge license. On these facts and all of the facts set out herein, the Board concludes that there has been a sale of a business from Mitsiou to the respondent within the meaning of section 63 of the Act and, therefore, the respondent is the successor employer within the meaning of that section.

14. It is necessary therefore to deal with the respondents' alternate position that it is entitled to the relief afforded by section 63(5) of the Act because the respondent has changed the character of the business acquired so that it is substantially different from the business of the predecessor employer. Section 63(5) allows the Board to terminate the bargaining rights of a trade union in circumstances where the business of the successor employer is substantially different from that of the predecessor. The Board's decision in *Winco-Steak'n Burger*, [1974] OLRB Rep. Nov. 788 describes the kind of situation for which section 63(5) of the Act was designed in the following terms:

"The implementation of subsection 5 of [section 63] involves the revocation of the remedial effects otherwise flowing from the provisions of [section 63] of the Act following the sale of a business. Having in mind the fact that subsection 5 runs against the flow of the general intent of the section, the Board takes the view that the words 'substantially different' must be viewed by the Board in the formulation of its opinion as involving a fundamental difference affecting the nature of the work requirements and skills involved in the business to the extent that continued representation by the trade union would be inadequate,

inappropriate or unreasonable in all the circumstances of the particular case under review.”.

15. The Hollywood Tavern, as operated by the predecessor, was in the business of selling hard spirits, draft beer and bottled beer under a dining lounge license and a liquor license. It did so in two rooms, a smaller one for men only with a capacity of approximately 150 persons and a larger one with a capacity for approximately 350 men and ladies. These rooms were serviced by the employees described in paragraph 5 above from two bars. Snack type food was available from a snack bar operated by the concessionaires. The predecessor held an adult entertainment license and provided entertainment in the form of burlesque type dancing and, from time to time, live musical entertainment. Cigarette vending machines and coin operated games were also available. The respondent continued the same type of business until it reopened as the House of Lancaster on March 25th. In the intervening period the respondent had substituted different suppliers for the cigarette vending machines and the coin-operated games, except for a shuffle board game which was one of the chattels acquired through the Agreement of Purchase and Sale. The respondent had also completed most of the repairs required by the various work orders against the premises, had redecorated the smaller of the two rooms and had built a new stage dividing the two rooms and which could be viewed from both of them. New stage lighting worth \$30,000.00 was also installed. The two service bars remain essentially unchanged. The respondent also took steps to provide a higher quality of service to the customers as already noted in paragraph 5 above, by having the waiter and waitresses take the customers orders and supply them from the two service bars which were attended by full-time bartenders and, to assist them, hired two busboys. The major and by far the most significant change made by the respondent was the introduction of the practice of having the dancers serve the customers when they were not dancing and while wearing the minimum costuming required under the applicable by-law. In other words the respondent introduced the same entertainment and service policy which had made its business successful at its prior location. Whereas the predecessor had been engaging only five of six dancers prior to the sale and did not have them serving the patrons, the respondent engaged some two dozen dancers per week and when they were not dancing, had them serve drinks to the customers.

16. That is the essential difference between the operation of the Hollywood Tavern and the operation of the House of Lancaster, that plus the improved quality of service which the respondent is striving for. Be that as it may, the continuing focus of the business is the sale of alcoholic beverages and that has not changed, except that the application of the respondent's entertainment and service policy has multiplied the revenue compared with the predecessor operation by some four to five times. In labour relations terms, except for the entertainer/waitresses, the nature of the work has not changed from that of preparing and serving alcoholic beverages so there has been no change in the nature of the work requirements and skills involved in the business. The entertainer/waitresses, when serving drinks to the patrons employ the same skills as persons hired only for that purpose. There is no doubt that they employ different skills when they are entertaining the patrons. These entertainers are engaged through agencies and are under individual contracts which purport to pay them a fixed fee for the week, clear, out of which the contract also purports to require them to discharge their own statutory obligations for the payment of such things as income tax, unemployment insurance and Canada Pension Plan. Therefore, if there is going to be any problem with respect to the continued representation by the trade union, it would be with respect to these persons. Applicant counsel admits that there may be some difficulty in establishing that these persons are employees within the meaning of the Act when they are working as entertainers. In view of that admission, it would be up to the applicant whether it would seek to represent any of them

in their capacity as entertainers and whether it would attempt to negotiate how much serving of customers they would do. As the Board has already noted, there is no difficulty with the applicant continuing to represent those employees who are engaged only in the serving of customers with alcoholic beverages. In those circumstances, the possibility of the problem just adverted to is insufficient to cause the Board, in the words of *Winco-Steak'n Burger, supra*, to revoke "... the remedial effects otherwise flowing from the provisions of [section 63] ..." and to grant the respondent the relief under subsection 5 of section 63 which it seeks.

17. The final issue then is whether the applicant has rights pursuant to either subsection 2 or 3 of section 63 as a result of the sale of the business. The applicant's collective bargaining relationship at the location began with the issuing of a certificate by the Ontario Labour Relations Board on August 6th, with respect to employees of the Hollywood Tavern. According to Joe Leithwood who testified at the hearing into the instant application, there have been a series of collective agreements since then. It was his evidence that the applicant's usual practice is to negotiate a master collective agreement with The Hotel Association of Metropolitan Toronto for those licensed establishments which are represented by that Association. The applicant will then sign separate short-form agreements with the proprietors of other licensed establishments by which they agree with the applicant to be bound by the terms of its collective agreement with the Association. This has been the consistent practice of the applicant over a substantial number of years and is frequently adverted to in Board decisions involving the applicant. For example, see the Board's decision in *Cabbagetown Inn Limited*, issued May 1, 1981, (unreported), at paragraph 10. It was Leithwood's evidence that he and Frank Cortese, secretary/treasurer and business agent of the applicant, signed on October 30th, 1981 a short-form agreement with John Mitchell binding the Hollywood Tavern to the current collective agreement with the Association which is effective from May 1st, 1981 to April 30th, 1983. Prior to signing that document, the applicant had sent to Mitchell a letter asking whether he would agree to be bound by the applicant's agreement with the association. That document was produced in evidence before the Board and Leithwood testified that it had been signed by Mitchell. The signature on the latter document does appear to be different than that purported to be Mitchell's signature on the short-form agreement and counsel for the respondent challenged the credibility of both Leithwood's testimony on that point and the documents themselves. The Board is satisfied that the signature purported to be Mitchell's on the short-form agreement appears the same as the signature also purported to be that of Mitchell's on Schedule "A" to the Agreement of Purchase and Sale. The letter to Mitchell asking him whether he would agree to be bound by the Association agreement is irrelevant as to whether he did in fact bind himself to that agreement, except insofar as it raises the question of the credibility of Leithwood's testimony. His demeanor as a witness was entirely credible in all other respects and, in light of the evidence by which the Board is able to satisfy itself that Mitchell did sign the short-form agreement, the Board finds that the Hollywood Tavern was bound to the collective agreement between The Hotel Association of Metropolitan Toronto and the applicant at the time of the sale of the business.

18. The Board declares therefore that the respondent is bound by the collective agreement between the applicant and the Hollywood Tavern, the name under which Mitsiou Holdings Limited had been carrying on business, as though the respondent had been a party thereto.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING JULY 1982

BARGAINING AGENTS CERTIFIED

No Vote Conducted

1972-81-R: United Steelworkers of America, (Applicant) v. Rheem Canada Inc., (Respondent) v. Group of Employees, (Objectors).

Unit: "all office, clerical and technical employees of the respondent in Hamilton, Ontario, save and except supervisors, persons above the rank of supervisor, salesmen, plant engineer, secretary to the plant manager, secretary-clerk, students employed during the school vacation period and persons regularly employed for not more than twenty-four hours per week." (19 employees in unit). (*Clarity Note*).

2261-81-R: International Molders & Allied Workers Union, (Applicant) v. Washington Mills Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Niagara Falls, save and except foremen, persons above the rank of foreman, office and sales staff, technical staff, and students employed during the school vacation period." (26 employees in unit).

2460-81-R: Welland Typographical Union, Local 927, (Applicant) v. Welland Evening Tribune, a Division of Canadian Newspapers Company Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent whose main office is located at 228 Main Street, Welland, including employees at the Port Colborne District Office, save and except employees covered by a collective agreement, the publisher, managing editor, city editor, news/wire editor, sports editor, accountant, advertising manager, advertising manager (Port Colborne Office), classified as advertising supervisor, circulation department manager, secretary to the publisher, students employed during the school vacation periods and persons regularly employed for not more than twenty-four periods and persons regularly employed for not more than twenty-four hours per week." (42 employees in unit). (*Clarity Note*).

0215-82-R: Canadian Union of Public Employees, (Applicant) v. Town of Markham Public Library Board, (Respondent).

Unit #1: "all employees of the respondent in the Town of Markham save and except chief librarian, administrative assistant to the chief librarian, branch heads, persons above such ranks, head office Technical Services, persons regularly employed for not more than twenty-four (24) hours per week." (53 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: (*See: Bargaining Agents Certified Subsequent to a Post Hearing Vote*).

0469-82-R: Retail, Commercial & Industrial Union, Local 206, Chartered by United Food & Commercial Workers International Union, (Applicant) v. Crestmount Funeral Home Ltd., (Respondent)

Unit: "all employees of the respondent in the City of Hamilton save and except manager and persons above the rank of manager." (9 employees in unit). (*Having regard to the agreement of the parties*).

0490-82-R: Retail Clerks Union, Local 1977 Chartered by the United Food & Zehrs Markets (A Division of Zehrmart Limited), (Respondent).

Unit: "all employees of the respondent at its retail store at the Brierdale Plaza, 115 Christopher Drive, Cambridge, Ontario, save and except the store manager and persons above the rank of store manager." (31 employees in unit). (*Having regard to the agreement of the parties*).

0492-82-R: United Brotherhood of Carpenters and Joiners of America, Local 2679, (Applicant) v. Bardeau Furniture & Equipment Ltd., (Respondent).

Unit: "all employees of the respondent at 120 Norfinch Drive, Weston, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff." (14 employees in unit). (*Having regard to the agreement of the parties*).

0503-82-R: Hotels, Clubs, Restaurants, and Taverns Employees' Local 261, (Applicant) v. Canada's Capital Building Services Limited, (Respondent).

Unit: "all employees of the respondent in the City of Cornwall, save and except the General Manager and office staff." (72 employees in unit).

0504-82-R: United Steelworkers of America, (Applicant) v. Lilo-Rail of Canada Limited and Modern Plating Company Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Mississauga, Ontario, save and except forepersons, persons above the rank of foreperson, office and sales staff, and students employed during the school vacation period." (52 employees in unit).

0521-82-R: Ontario Nurses' Association, (Applicant) v. Bestview Holdings Limited, (Respondent).

Unit: "all registered and graduate nurses employed in a nursing capacity by Bestview Holdings Limited at Bestview Health Care Centre in Orillia, Ontario, save and except Director of Nursing and persons above the rank of Director of Nursing." (10 employees in unit). (*Having regard to the agreement of the parties*).

0522-82-R: Service Employees International Union, Local 183 A.F. of L., C.I.O., C.L.C., (Applicant) v. Gardiner's Super Market Limited, (Respondent).

Unit #1: "all employees of the respondent at Picton, Ontario save and except grocery manager, persons above the rank of grocery manager, office and clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (13 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent at Picton, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except grocery manager, persons above the rank of grocery manager, office and clerical staff." (26 employees in unit). (*Having regard to the agreement of the parties*).

0523-82-R: Labourers' International Union of North America, Local 183, (Applicant) v. York Condominium Corporation No. 164, (Respondent).

Unit: "all employees of the respondent engaged in cleaning and maintenance at 10 Eddystone Avenue, Downsview, Ontario including resident superintendents, save and except property manager, office and clerical staff." (3 employees in unit).

0535-82-R: Ontario Public Service Employees Union, (Applicant) v. Association of Canadian Community Colleges/ Association Des Colleges Communitaires Du Canada, (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto save and except directors, those above the rank of director, secretary to the executive director, associate director,

associate director of the International Bureau, administrative assistant, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (10 employees in unit). (*Having regard to the agreement of the parties*).

0554-82-R: International Beverage Dispensers’ and Bartenders’ Union, Local 280 of the Hotel and Restaurant Employees’ and Bartenders’ International Union A.F.L.-C.I.O.-C.L.C., (Applicant) v. Ralex Investments Limited Known as: “Nag’s Head North, (Respondent).

Unit: “all full time and part time tapmen, bartenders, waiters, barboys and improvers of the respondent at the Nag’s Head North in Markham, save and except manager and persons above the rank of manager.” (36 employees in unit). (*Having regard to the agreement of the parties*).

0558-82-R: Canadian Union of Public Employees, (Applicant) v. Corporation of the County of Frontenac, (Respondent).

Unit: “all employees of the respondent in the County of Frontenac save and except project supervisors, persons above the rank of project supervisor, secretary to the clerk administrator, secretary to the county engineer, library pages and students employed during the school vacation period.” (92 employees in unit). (*Having regard to the agreement of the parties*).

0571-82-R: London and District Service Workers’ Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. Elgin County Roman Catholic Separate School Board, (Respondents) v. Employee, (Objector).

Unit: “all employees of Elgin County Roman Catholic Separate School Board engaged in maintenance and plant operations regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except foremen, persons above the rank of foreman and office staff.” (4 employees in unit). (*Having regard to the agreement of the parties*).

0591-82-R: International Union of Operating Engineers, Local 793, (Applicant) v. F. H. R. Construction Co. Ltd., (Respondent).

Unit #1: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

Unit #2: “all employees of the respondent in that portion of the District of Cochrane north of the 50th parallel of latitude, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (3 employees in unit).

0593-82-R: Service Employees Union, Local 204 affiliated with the A.F. of L., C.I.O., C.L.C., (Applicant) v. Mini-Skools Ltd., (Respondent).

Unit: “all employees of the respondent at 25 Kings Cross Road, Brampton, Ontario, save and except supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (46 employees in unit). (*Having regard to the agreement of the parties*).

0594-82-R: United Brotherhood of Carpenters and Joiners of America, Local Union 93, (Applicant) v. Contact Construction Ltd., (Respondent).

Unit #1: “all carpenters and carpenters’ apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and

except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the United Counties of Stormont, Dundas and Glengarry, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

0597-82-R: United Food and Commercial Workers International Union affiliated with the Canadian Labour Congress AFL-CIO, (Applicant) v. American Can Canada, Inc., (Respondent).

Unit: "all employees of the respondent at Whitby, Ontario, save and except foremen, persons above the rank of foreman, office sales staff." (12 employees in unit). (*Having regard to the agreement of the parties*).

0630-82-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Applicant) v. Birla Industries Incorporated, (Respondent).

Unit: "all office and clerical employees of the respondent in City of Windsor, Ontario, save and except supervisors, persons above the rank of supervisor, sales staff, employees covered by an existing collective agreement between the respondent and Local 195, U.A.W., persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (4 employees in unit). (*Having regard to the agreement of the parties*).

0631-82-R: London and District Service Workers' Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. Chelsey Park Oxford, a division of Diversicare Corporation, (Respondents).

Unit: "all employees of the respondent at its apartment complex in London, Ontario, save and except supervisors, persons above the rank of supervisors, professional nursing staff, office and clerical staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons covered by subsisting collective agreements." (3 employees in unit). (*Having regard to the agreement of the parties*).

0640-82-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., (Applicant) v. Hofer Industries Inc., (Respondent).

Unit: "all employees of the respondent working at Mississauga, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (15 employees in unit). (*Having regard to the agreement of the parties*).

0662-82-R: Amalgamated Transit Union, Local 113, (Applicant) v. All-Way Transportation Services Limited (Wheel-Trans Division), (Respondent).

Unit: "all drivers of All-Way Transportation Services Limited in the Wheel-Trans Division employed in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisors, office and sales staff, persons employed for not more than 24 hours per week and students employed during the school vacation period." (115 employees in unit). (*Having regard to the agreement of the parties*).

0664-82-R: Service Employees Union, Local 204 affiliated with the A.F. of L., C.I.O., C.L.C., (Applicant) v. VS Services Ltd., (Respondent).

Unit: "all employees of the respondent at the Mount Sinai Hospital, Toronto, Ontario, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (29 employees in unit). (*Having regard to the agreement of the parties*).

0675-82-R: International Union of Operating Engineers, Local 793, (Applicant) v. B & L Gottardo Bros. Excavating Ltd., (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (12 employees in unit).

Unit #2: "all employees of the respondent in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (12 employees in unit).

0696-82-R: International Union of Operating Engineers, Local 793, (Applicant) v. Con-Drain Company Limited, (Respondent).

Unit #1: "all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foreman and persons above the rank of non-working foreman." (4 employees in unit).

Unit #2: "all employees of the respondent in the Regional Municipality of Ottawa-Carleton and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

0719-82-R: Construction Workers Local 6, affiliated with the Christian Labour Association of Canada, (Applicant) v. Buisman's Plumbing & Heating Ltd., (Respondent).

Unit: "all plumbers and plumbers' apprentices in the employ of the respondent in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Township of Nassagaweya, save and except non-working foreman and persons above the rank of non-working foreman." (2 employees in unit).

0720-82-R: Labourers' International Union of North America Local 837, (Applicant) v. Gazzola Paving, (Respondent).

Unit: "all employees of the respondent in the Regional Municipality of Hamilton-Wentworth the city of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic township of Nassagaweya excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (12 employees in unit).

0721-82-R: Canadian Union of Operating Engineers and General Workers, (Applicant) v. Modern Building Cleaning, a Division of Dustbane Enterprises Limited, (Respondent).

Unit: "all employees of the respondent at the Elizabeth Bruyere Hospital in Ottawa, Ontario, save and except foremen and foreladies, persons above the rank of foreman and forelady, office, clerical and sales staff." (31 employees in unit). (*Having regard to the agreement of the parties*).

0722-82-R: Ontario Public Service Employees Union, (Applicant) v. Mains Ouvertes-Open Hands Inc., (Respondent).

Unit: "all employees of the respondent at Cornwall, Ontario, save and except executive director, persons above the rank of executive director, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (12 employees in unit). (*Having regard to the agreement of the parties*).

0729-82-R: Amalgamated Clothing & Textile Workers Union AFL-CIO-CLC. (Applicant) v. Penmans Division of Dominion Textile Inc., (Respondent).

Unit: "all employees of the respondent at Cambridge, Ontario, save and except supervisors, persons above the rank of supervisor, chief engineer, office and sales staff, laboratory technicians, industrial engineers, printers, product development personnel, quality control personnel, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (36 employees in unit). (*Having regard to the agreement of the parties*).

0776-82-R: International Brotherhood of Painters and Allied Trades Local Union 1891, (Applicant) v. Jane-Towne Painting Limited, (Respondent).

Unit #1: "all painters and painters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in unit).

Unit #2: "all painters and painters' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in unit).

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

2707-81-R; 2708-81R: Labourers' International Union of North America, Local 607, (Applicant) v. Cekan Concrete & Tile Limited, (Respondent) v. Lumber and Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, (Intervener).

Unit: "all construction labourers and all employees engaged in cement finishing, waterproofing and restoration work in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers and all employees engaged in cement finishing, waterproofing and restoration work in the employ of the respondent in all other sectors in the District of Thunder Bay, the District of Rainy River, and the District of Kenora including the Patricia portion, save and except non-working foremen, and persons above the rank of non-working foreman." (15 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on list as originally prepared by employer		12
Number of persons who cast ballots		12
Number of ballots marked in favour of applicant	7	
Number of ballots marked in favour of intervener	1	
Ballots segregated and not counted	4	

0048-82-R: Canadian Paperworkers Union (Applicant) v. Waferboard Corporation Limited, (Respondent) v. Lumber and Sawmill Workers Union, Local 2995 of Carpenters (Intervener).

Unit: "all employees engaged in the plants and yard of the respondent's operations at Timmins,

Ontario, save and except foremen, those above the rank of foreman, office staff, laboratory staff and scaler." (108 employees in unit). (*Clarity Note*).

Number of names of persons on revised voters' list		112
Number of persons who cast ballots		93
Number of ballots marked in favour of applicant	81	
Number of ballots marked in favour of intervener	12	

0520-82-R: Canadian Union of Public Employees, (Applicant) v. Cornwall General Hospital, (Respondent).

Unit: "all employees of the respondent at Cornwall, Ontario, regularly employed for not more than 24 hours per week and students employed for the school vacation period, save and except office staff, professional medical staff, graduate pharmacists, undergraduate pharmacists, graduate dietitians, student dietitians, technical personnel supervisors and persons above the rank of supervisor, and those employees covered by subsisting collective agreements." (81 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared		80
Number of persons who cast ballots		39
Number of ballots marked in favour of applicant	38	
Number of ballots marked against applicant	0	
Ballots segregated and not counted	1	

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

0215-81-R: Canadian Union of Public Employees, (Applicant) v. Town of Markham Public Library Board, (Respondent).

Unit #1: (*See Bargaining Agents Certified — No Vote Conducted*).

Unit #2: "all employees of the respondent in the town of Markham regularly employed for not more than twenty-four hours per week save and except chief librarian, administrative assistant to the chief librarian, branch heads, persons above such ranks, head of Technical Services and pages." (53 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Number of names of persons on list as originally prepared		21
Number of persons who cast ballots		18
Number of ballots marked in favour of applicant	16	
Number of ballots marked against applicant	2	

Applications for Certification Dismissed — No Vote Conducted

1833-81-R: Hotel, Restaurant & Cafeteria Employees Union, Local 75, (Applicant) v. The Constellation Hotel Corporation Ltd., (Respondent).

0304-82-R: International Molders & Allied Workers Union, (Applicant) v. Dutch Laundry & Dry Cleaners Ltd., (Respondent).

0365-82-R: Canadian Union of Public Employees, (Applicant) v. The Shaver Hospital for Chest Diseases, (Respondent).

0532-82-R: United Brotherhood of Carpenters Local 1316 & Local 1256, (Applicant) v. Stoy Partition and Ceiling Systems Limited; Jason Drywall Limited, (Respondent) v. Group of Employees, (Objectors).

0551-82-R: The United Headwear, Optical and Allied Workers Union of Canada, Local 3, (Applicant) v. Biltmore-Stetson of Canada Limited and Peat Marwick Limited as Receiver and Manager of Biltmore Industries Limited, (Respondents) v. Hat Workers Union Local 82, of the United Hatters, Cap and Millinery Workers International Union, (Intervener).

0676-82-R: Hotels, Clubs, Restaurants, Taverns Employees Union Local 261, (Applicant) v. Citipark, Division of Citicom Inc., (Respondent).

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

0248-82-R: Labourers' International Union of North America, Local 506, (Applicant) v. Nick's Concrete Floor Cutting, (Respondent) v. Operative Plasterers and Cement Masons' International Union Local 598, (Intervener).

Unit: "all working foremen, journeymen, apprentice cement masons and waterproofers engaged in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all working foremen, journeymen, apprentice cement masons and waterproofers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foreman, and persons above the rank of non-working foreman." (3 employees in unit). (*Clarity Note*).

Number of names of persons on revised voters' list		3
Number of persons who cast ballots		0
Number of ballots marked in favour of applicant	0	
Number of ballots marked in favour of intervener	0	

0468-82-R: United Electrical, Radio and Machine Workers of America, (Applicant) v. Westinghouse Canada Inc., (Respondent).

Unit: "all employees of the respondent in the Municipality of Renfrew save and except unit managers, persons above the rank of unit manager, office, clerical, sales and engineering staff." (66 employees in unit).

Number of names of persons on list as originally prepared by employer		68
Number of persons who cast ballots		67
Number of ballots marked in favour of applicant	17	
Number of ballots marked against applicant	50	

Applications for Certification Dismissed Subsequent to a Post Hearing Vote

2135-79-R: Labourers' International Union of North America, Local 183, (Applicant) v. F. W. Woolworth Co. Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of F. W. Woolworth Co. Limited employed at 277 Humberline Drive, in the Borough of Etobicoke, in the Municipality of Metropolitan Toronto, save and except foremen, persons above the rank of foreman, sales, office and clerical staff." (37 employees in unit).

Number of names of persons on list as originally prepared by employer		19
Number of persons who cast ballots		17
Number of ballots marked in favour of applicant	1	
Number of ballots marked against applicant	16	

1540-81-R: International Ladies Garment Workers' Union, (Applicant) v. 490296 Ontario Limited, carrying on business as Chandelle Fashions, (Respondent).

Unit: "all employees in Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office and sales staff, mechanics, designers, shippers, truck drivers, persons regularly employed for not more than twenty-four (24) hours per week, and students employed during the school vacation period." (32 employees in unit).

Number of names of persons on list as originally prepared by employer		42
Number of persons who cast ballots	33	
Number of spoiled ballots	1	
Number of ballots marked in favour of applicant	11	
Number of ballots marked against applicant	21	

0294-82-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC:, (Applicant) v. Tarnopol Holdings Ltd. and 297501 Ont. Ltd., (Respondents) v. Group of Employees, (Objectors).

Unit: "all employees of the respondents in Ottawa, Nepean and Cornwall, Ontario, save and except the owners." (13 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		14
Number of persons who cast ballots	9	
Number of ballots marked in favour of applicant	1	
Number of ballots marked against applicant	8	

APPLICATIONS FOR CERTIFICATION WITHDRAWN

2585-81-R: Labourers' International Union of North America, Local 1089, (Applicant) v. Great Lakes Fabricating, a Division of Glascar Ltd., (Respondent) v. Operative Plasterers and Cement Masons International Association of the United States and Canada, Local 915, (Intervener).

0379-82-R: International Union of Operating Engineers, Local 793, (Applicant) v. Ron Robinson Limited, (Respondent).

0505-82-R: United Steelworkers of America, (Applicant) v. Encyclopaedia Britannica Publications Ltd., (Respondent).

0545-82-R: United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO-CLC, (Applicant) v. Ellens Cartage Limited, (Respondent).

0557-82-R: Canadian Union of Public Employees, (Applicant) v. Fairmount Home for the Aged, (Respondent).

0570-82-R: Canadian Union of Public Employees, (Applicant) v. The Board of Governors of the Ongwanada Hospital, Kingston, Ontario — Hopkins Division, (Respondent).

0592-82-R: International Union of Operating Engineers, Local 793, (Applicant) v. Duntri Construction, (Respondent).

0656-82-R: United Headwear, Optical and Allied Workers Union of Canada, Local 3, (Applicant) v. Harris Cap and Textile Company Limited, (Respondent) v. Capmakers Union, Local 47 of the United Hatters, Cap and Millinery Workers International Union, (Intervener).

0678-82-R: Sheet Metal Workers' Local 537, (Applicant) v. LeBlanco Limited, (Respondent).

0768-82-R: Hotel, Restaurant and Cafeteria Employees Union, Local 75, (Applicant) v. The Strand Restaurant, (Respondent).

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1203-81-R: Energy and Chemical Workers Union, Local 300, (Applicant) v. Ethyl Canada, Inc. and F.I.R.M., (Respondents) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 663, (Intervener). (*Dismissed*).

2717-81-R: United Association Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 463, (Applicant) v. Hyten Mechanical Ltd. and Dawson-Coleman 1974 Limited, (Respondents). (*Dismissed*).

0563-82-R: International Ladies Garment Workers' Union, (Applicant) v. 490296 Ontario Limited, carrying on business as Chandelle Fashions, (Respondent) v. Group of Employees, (Objectors). (*Dismissed*)

SALE OF A BUSINESS

1680-81-R: International Ladies Garment Workers' Union, (Applicant) v. 490296 Ontario Limited, carrying on business as Chandelle Fashions, (Respondent) v. Group of Employees, (Objectors). (*Dismissed*).

2718-81-R: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 463, (Applicant) v. Hyten Mechanical Ltd. and Dawson-Coleman 1974 Limited, (Respondents). (*Granted*).

0109-82-R: United Steelworkers of America, (Applicant) v. U S L Industries Inc., (Respondent). (*Dismissed*).

0363-82-R: Service Employees Union, Local 210 AF of L-CIO-CLC, (Applicant) v. 507845 Ontario Inc., (Respondent). (*Granted*).

0501-82-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), (Applicant) v. Kershaw Manufacturing Canada Ltd., (Respondent). (*Withdrawn*).

UNION SUCCESSOR RIGHTS

2683-81-R; 2684-81-R: West Bend of Canada Division of Dart Industries Canada Limited, (Applicant) v. United Steelworkers of America, (Respondent). (*Dismissed*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2135-81-R: Ena June Coles, Joanne Howard, Ada Zimmerling, (Applicants) v. Retail Commercial and Industrial Union, Local 206, formerly Health Office and Professional Employees, Local 1976, (Respondent) v. W. Frank Real Estate Limited, (Intervener).

Unit: "all employees of the intervener in Oshawa, save and except Head Bookkeeper, persons above the rank of Head Bookkeeper, the confidential secretary to the President, sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (*Dismissed*).

Number of names of persons on revised voters' list		6
Number of persons who cast ballots		6
Number of ballots marked in favour of respondent	3	
Number of ballots marked against respondent	3	

2154-81-R: F. C. M. Construction Limited, (Applicant) v. Labourers' International Union of North America, Local 183, (Respondent).

Unit: "all construction labourers employed by F. C. M. Construction Limited in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except construction labourers employed on building projects, non-working foremen and persons above the rank of non-working foreman." (*Granted*).

Number of names of persons on list as originally prepared by employer		3
Number of persons who cast ballots		3
Number of ballots marked in favour of respondent	0	
Number of ballots marked against respondent	3	

2681-81-R; 2682-81-R: West Bend of Canada Division of Dart Industries Canada Limited, (Applicant) v. United Steelworkers of America, (Respondent). (*Dismissed*).

0206-82-R: Richard Wylie, (Applicant) v. International Federation of Professional and Technical Engineers A.F.L.-C.I.O.-C.L.C. and its Local 164 D.A.O., (Respondent) v. Allen-Bradley Canada Limited, (Intervener).

Unit: "all draftsmen and apprentice draftsmen in the employ of the intervener in its drawing offices in the Regional Municipality of Cambridge, Ontario, save and except supervisors, persons above the rank of supervisor, instructors, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (*Granted*).

Number of names of persons on list as originally prepared by employer		23
Number of persons who cast ballots		24
Number of ballots marked in favour of respondent	0	
Number of ballots marked against respondent	24	

0221-82-R: Anthony DiNova, representing the petitioners, (Applicant) v. United Food and Commercial Workers International Union A.F.L.-C.I.O.-C.L.C. (Respondent) v. 352018 Ontario Ltd., operating under the name and style of Select Meat Packers 77, (Intervener). (*Granted*).

0321-82-R: T. J. Harrison, (Applicant) v. Food and Service Workers of Canada, (Respondent) v. Zum Rudy Foods Limited, (Intervener).

Unit: "all employees of Zum Rudy Foods Limited in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office staff, musicians, and chefs exercising managerial functions." (*Granted*).

Number of names of persons on list as originally prepared by employer		25
Number of persons who cast ballots	16	
Number of ballots marked in favour of respondent	1	
Number of ballots marked against respondent	15	

0366-82-R: Angelina Papa, (Applicant) v. International Leather Goods, Plastics and Novelty Union, Local 8, (Respondent) v. Paragon Leather Goods Limited, (Intervener). (*Dismissed*).

0382-82-R: T. Canino, (Applicant) v. Canadian Union of United Brewery Flour, Cereal Soft Drink and Distillery Workers Local 34, (Respondent).

Unit: "all owner drivers of single unit trucks regularly engaged in hauling aggregates from the respondent's Acton quarry." (*Granted*).

Number of names of persons on revised voters' list		12
Number of persons who cast ballots	11	
Number of ballots marked in favour of respondent	0	
Number of ballots marked against respondent	11	

0506-82-R: Bert Drewes, (Applicant) v. Amalgamated Clothing and Textile Workers Union, (Respondent) v. Candur Plastics Limited, (Intervener). (*Dismissed*).

0590-82-R: Chapples Limited, (Applicant) v. Retail Clerks Union, Local 409, chartered by Retail Clerks International, CLC-AFL-CIO, (Respondent). (*Granted*).

REFERRAL AS TO APPOINTMENT OF CONCILIATION OFFICER

2685-81-M: Famous Players Limited, (Employer) v. Motion Picture Project Picture Projectionists Union, Local 432, International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, (Trade Union). (*Granted*).

2686-81-M: Canadian Odeon Theatres Ltd., (Employer) v. Motion Picture Projectionists Union, Local 432, International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, (Trade Union). (*Granted*).

2687-81-M: Premier Operating Corporation Limited, (Employer) v. Motion Picture Projectionists Union, Local 432, International Alliance of Theatrical Stage Employees and Moving Picture Operators of the United States and Canada, (Trade Union). (*Granted*).

0539-82-M: Stoney Creek Mechanical Limited, (Employer) v. Sheet Metal Workers' International Association, Local 537, (Respondent). (*Granted*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

0121-82-U: Ferranti-Packard Transformers Ltd., (Applicant) v. John McMillan, Nick Valenti, Brian Finlayson, Robert McCrudden, (Respondent). (*Withdrawn*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE CONSTRUCTION INDUSTRY

0394-82-U: Sarnia Construction Association and Labour Relations Bureau of the Ontario General Contractors Association, (Applicant) v. Sheet Metal Workers International Association, Local Union 539 and Ed McDonald (Respondent). (*Withdrawn*).

0406-82-U: Mechanical Contractors' Association Ontario, (Applicant) v. Honeywell Controls Ltd.; Johnson Controls Ltd.; United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 46; and United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, (Respondents). (*Terminated*).

0529-82-U: Mechanical Contractors Association Ontario; Mechanical Contractors Association-Zone 6-London, (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 593; B. Anderson P & A Plumbing & Mechanical Contractors Ltd; and Cor-Mac Mechanical; (Respondents). (*Granted*).

0566-82-U: Mechanical Contractors Association Ontario; Mechanical Contractors Association-Zone 1, (Applicants) v. United Association of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 628; G. Merservier, Kamtar Construction Limited; and Quinard Limited, (Respondent). (*Granted*).

0581-82-U: Mechanical Contractors Association Ontario; Mechanical Contractors Association-Zone 6, (Applicants) v. United Association of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 593; B. Anderson; K. Martin; Dieleman Industrial Installations Ltd., (Respondents). (*Dismissed*).

0589-82-U: Mechanical Contractors Association Ontario; Mechanical Contractors Association-Zone 1, (Applicants) v. United Association of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 628; G. Meservier-Kamtar Construction Limited-Quinard Limited, (Respondents) v. Erco Industries Limited, (Intervener). (*Granted*).

0660-82-U: Mechanical Contractors Association Ontario, (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 800, M. Zangari and FDV Construction, and Lakeway Rental, (Respondent). (*Withdrawn*).

0669-82-U: Genstar Stone Products Inc., (Applicant) v. International Union of Operating Engineers, Local 793 et al., (Respondent). (*Withdrawn*).

0762-82-U: Banister Pipelines, A Division of Banister Continental Ltd. (Applicant) v. The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and its Local Union 46, J. Russ St. Eloi, William Howard, William Weatherup, Archie Smith, Irv Anderson, Lyle Ramsay, Phil Johnson, Orvil Baldwin, William Hodgson, (Respondents) v. O. J. Pipelines Ltd. and Trans-Canada Pipelines Ltd., (Interveners). (*Granted*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT

2608-81-U: Christian Labour Association of Canada, (Applicant) v. Sun Ray Solar Systems Limited, (Respondent). (*Terminated*).

0588-82-U: Canadian Union of Public Employees Local 1230, (Applicant) v. University of Toronto, (Respondent). (*Dismissed*).

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1681-81-U: International Ladies Garment Workers' Union, (Complainant) v. 490296 Ontario Limited, carrying on business as Chandelle Fashions, (Respondent) v. Group of Employees, (Objectors). (*Granted*).

2085-81-U: Melvin Haukaas, (Complainant) v. Local #1744. (Fort Francis) International Brotherhood of Electrical Workes, (Respondent) v. Boise Cascade Canada Ltd., (Intervener). (*Dismissed*).

2138-81-U: United Steelworkers of America, (Complainant) v. Mirlon Plastics Ltd., (Respondent). (*Granted*).

2178-81-U: United Food and Commercial Workers International Union AFC-CIO-CLL, (Complainant) v. C.S.P. Foods Ltd., (Respondent). (*Withdrawn*).

2560-81-U: Laundry and Linen Drivers and Industrial Workers Union, Teamsters Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Temple Wire Products Ltd., (Respondent). (*Withdrawn*).

2607-81-U: Christian Labour Association of Canada, (Complainant) v. Sun Ray Solar Systems Limited, (Respondent). (*Granted*).

2619-81-U; 2645-81-U: United Food & Commercial Workers International Union, (Complainant) v. Tops Food Market, (Respondent). (*Withdrawn*).

0218-82-U: Sylvia Colalillo, (Complainant) v. United Auto Workers International and Local 525, (Respondent). (*Dismissed*).

0234-82-U: Roland E. LaPratte, (Complainant) v. Local 1590 Ronald Last, (Respondent). (*Withdrawn*).

0428-82-U: Thomas S. Latto, (Complainant) v. Dufferin Concrete Products, (Respondent). (*Withdrawn*).

0455-82-U: Teamsters Local Union No. 230, Ready Mix, Building Supply, Hydro and Construction Drivers, Warehousemen and Helpers, of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. A & T Haulage, (Resondent). (*Withdrawn*).

0463-82-U: Roland E. Lapratte, (Complainant) v. Ronald Last — Business Agent Local 1590 Painters Union, (Respondent). (*Withdrawn*).

0465-82-U: Graham John Douglas, (Complainant) v. Savory Electric Ltd., (Respondent). (*Withdrawn*).

0510-82-U: Milk and Bread Drivers, Dairy Employees, Caterers and Employees, Local Union No. 647, affiliated with the International Brother Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of Amereica, (Complainant) v. Wark Milk Transport Limited, (Respondent). (*Withdrawn*).

0538-82-U: Joseph MacIsaac, (Complainant) v. Brown Bovie Howden, (Respondent). (*Withdrawn*).

0548-82-U: Donna Smith, (Complainant) v. George Wilson, (Respondent). (*Withdrawn*).

0565-82-U: Extendicare Ltd., (Complainant) v. Canadian Union of Public Employees and its Local 1586 and Grenville Jones, Kathy Tobin, Jen Gatherty, and Muriel Losier, (Respondents). (*Withdrawn*).

0567-82-U: United Steelworkers of America and its Local 7291, (Complainants) v. Globe Spring & Cushion Co. Ltd., Kelson Spring Products Limited, and Regal Spring Company, (Respondents). (*Granted*).

0575-82-U: Christian Labour Association of Canada, (Complainant) v. Ark Eden Nursing Home, (Respondent). (*Withdrawn*).

0576-82-U: James A. Davis, (Complainant) v. Comco Metal & PLastics Ind., (Respondent). (*Withdrawn*).

0578-82-U: Danny Bernard McArán, (Complainant) v. Dominion Envelope Division of Domtar Inc., (Respondent) v. Canadian Paperworkers Union, (Intervener). (*Withdrawn*).

0579-82-U: Food and Service Workers of Canada, (Complainant) v. Royal Bank Plaza Restaurants (C.P. Hotels), (Respondent). (*Withdrawn*).

0599-82-U: Gerald Aubin, (Complainant) v. Marcel Villeneuve, Business Agent for Teamsters Union Local 230, (Respondent). (*Withdrawn*).

0605-82-U: Stanley E. Patterson, (Complainant) v. Service Employee's Union Local 478, (Respondent). (*Withdrawn*).

0611-82-U: United Brotherhood of Carpenters and Joiners of America, Local Union 3054, (Complainant).

0614-82-U: United Steelworkers of America, (Applicant) v. Lilo-Rail of Canada Limited and Modern Plating Company Limited, (Respondent) v. Group of Employees, (Objectors). (*Dismissed*).

0615-82-U: Hotels, Clubs, Restaurants, Tavern Employees' Union Local 261, (Complainant) v. Beacon Arms Hotel (Rodas Investments). (Respondent). (*Withdrawn*).

0628-82-U: International Beverage Dispensers and Bartenders Union, Local 280, (Complainant) v. Karlin Hotel, (Respondent). (*Withdrawn*).

0633-82-U: Tony Ciallella, (Complainant) v. Bricklayers, Masons Independent Union of Canada, (Respondent). (*Withdrawn*).

0639-82-U: Peter George, (Complainant) v. Babcock & Wilcox Industries Ltd. United Steelworkers of America Local 2859, (Respondent). (*Withdrawn*).

0650-82-U: Stuart Breiland, (Complainant) v. Amalgamated Transit Union Local 966, (Respondent). (*Withdrawn*).

0655-82-U: The Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario and The Electrical Contractors Association of Quinte-St. Lawrence, (Complainants) v. E.S. Fox Ltd. and International Brotherhood of Electrical Workers, Local Union 115, (Respondents). (*Withdrawn*).

0661-82-U: Joseph Clark, (Complainant) v. Joe Maloney and Management of Excel Metal Craft, (Respondents). (*Withdrawn*).

0667-82-U: Srbin Vidinovski, (Complainant) v. Labourers' International Union of North America Local 183, (Respondent). (*Withdrawn*).

0673-82-U: United Steelworkers of America, (Complainant) v. Tech Corporation Limited (Silverfields Division), (Respondent). (*Dismissed*).

0694-82-U: Paul James, (Complainant) v. Tom Morrissey and Harold Gillmore Carrier Air Conditioning Sheet Metal Workers International Local 575, (Respondent). (*Withdrawn*).

0700-82-U: Bart Baxter, (Complainant) v. Local Union #46, (Respondent). (*Withdrawn*).

0701-82-U: Canadian Union of Public Employees, Local 10, (Complainant) v. The Borough of York, (Respondent). (*Withdrawn*).

0702-82-U: Bakery, Confectionary and Tobacco Workers International Union, Local 325-T, (Complainant) v. Benson & Hedges (Canada) Limited, (Respondent). (*Withdrawn*).

0704-82-U: United Brotherhood of Carpenters and Joiners of America, Local 1256, (Complainant) v. Hardrock Forming Co., A Division of 270915 Ontario Limited, (Respondent). (*Withdrawn*).

0726-82-U: Michel S. Gauthier, (Complainant) v. International Labourer's Union, Local #527 — Ottawa, (Respondent). (*Withdrawn*).

0727-82-U: Fernand Roberge, (Complainant) v. International Labourers Union Local #493, (Respondent). (*Withdrawn*).

0730-82-U: Service Employees International Union, Local 183, (Complainant) v. E. J. McQuiggen Lodge, (Respondent). (*Withdrawn*).

0736-82-U: Terry Davey, (Complainant) v. C.U.P.E. LOCAL 16, (Respondent). (*Withdrawn*).

0737-82-U: Peter George, (Complainant) v. Babcock & Wilcox Industries Ltd., United Steelworkers of America Local 2859, (Respondent). (*Withdrawn*).

0765-82-U: Jackson-Lewis Company Limited, (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 221, John Woodick and John Telford, (Respondents). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO PROSECUTE

2660-81-U: United Food & Commercial Workers International Union, (Applicant) v. Tops Food Market, (Respondent). (*Withdrawn*).

0612-82-U: United Brotherhood of Carpenters and Joiners of America, Local Union 304, (Applicant) v. 363326 Ontario Limited carrying on business as The Craftsman's Circle, (Respondent). (*Withdrawn*).

APPLICATIONS FOR RELIGIOUS EXEMPTION

0474-82-M: Margaret Richer, (Applicant) v. Canadian Union of Public Employees, Local 3009, (Respondent Trade Union) v. Rygiel Home, (Respondent Employer). (*Granted*).

0475-82-M: Margaretha Oosthock, (Applicant) v. Canadian Union of Public Employees, Local 3009, (Respondent Trade Union) v. Rygiel Home, (Respondent Employer). (*Granted*).

0476-82-M: Jasmin Ostermeier, (Applicant) v. Canadian Union of Public Employees, Local 3009, (Respondent Trade Union) v. Rygiel Home, (Respondent Employer). (*Granted*).

0604-82-M: Yvon Rochon, (Applicant) v. United Steelworkers of America, (Respondent Trade Union) v. Inco Metals, (Respondent Employer). (*Dismissed*).

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0375-82-M: Glendale Spinning Mills (1981) Ltd., (Employer) v. Amalgamated Clothing and Textile Workers and its Local 1070-T, (Trade Union). (*Granted*).

0497-82-M: Essex International of Canada Limited, (Employer) v. International Association of Machinists & Aerospace Workers, Lodge No. 2245, (Trade Union). (*Granted*).

JURISDICTIONAL DISPUTES

1880-80-JD: Tilechem Limited, (Complainant) v. United Brotherhood of Carpenters and Joiners of America, Local 1669, Labourers' International Union of North America, Ontario Provincial District Council and The Labourers' International Union of North America, Local 607, (Respondents) v. Ontario Masonry Contractors Association, (Intervener). (*Granted*).

APPLICATIONS FOR DETERMINING EMPLOYEE STATUS

1933-81-M: The Office and Professional Employees' International Union, Local 225, (Applicant) v. Racine, Robert & Gauthier Reg'd, (Respondent). (*Withdrawn*).

0010-82-M: International Brotherhood of Electrical Workers, Local 636, (Applicant) v. Hydro Electric Commission of the Borough of Etobicoke, (Respondent). (*Dismissed*).

0415-82-M: C.U.P.E. Local 2504, (Applicant) v. Nepean Public Library, (Respondent). (*Withdrawn*).

COLLEGES COLLECTIVE BARGAINING ACT (Applications for Determining Employee Status)

0409-82-M: Ontario Public Service Employees Union, (Applicant) v. Canadore College of Applied Arts & Technology, (Respondent). (*Granted*).

CONSTRUCTION INDUSTRY GRIEVANCES

1508-80-M: United Brotherhood of Carpenters and Joiners of America, Local Union 446, (Applicant) v. Eton Construction Limited, (Respondent). (*Granted*).

0445-81-M: United Brotherhood of Carpenters and Joiners of America, Local 2486, (Applicant) v. 462558 Ontario Inc., and Frusino Structure Inc., (Respondents). (*Granted*).

1847-81-M: Labourers' International Union of North America, Local 506, v. Disney Display, (Respondent). (*Withdrawn*).

2268-81-M: Sheet Metal Workers' International Association Local Union No. 537, (Applicant) v. Stoney Creek Mechanical Limited, (Respondent). (*Withdrawn*).

2389-81-M: United Brotherhood of Carpenters and Joiners of America, Local 183, (Applicant) v. Donaldson-Barron Limited, (Respondent). (*Granted*).

2390-81-M: Local 47, Sheet Metal Workers' International Association, (Applicant) v. Albert's Siding, (Respondent). (*Dismissed*).

2539-81-M: Sheet Metal Workers' International Association, Local 30, (Applicant) v. Rexway Sheet Metal Limited, (Respondent). (*Dismissed*).

0035-82-M: Labourers' International Union of North America, Local 1081, (Applicant) v. Thomas Construction (Galt) Limited, (Respondent). (*Granted*).

0151-82-M: International Union of Operating Engineers, Local 793, (Applicant) v. Dominion Bridge Co. Ltd., (Respondent). (*Withdrawn*).

0182-82-M: Lake Ontario District Council on behalf of Local Union 1450 of The United Brotherhood of Carpenters & Joiners of America, (Applicant) v. Marel Contractors Enterprises Limited, (Respondent). (*Withdrawn*).

20346-82-M: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 463, (Applicant) v. Hyten Mechanical Ltd. and Dawson-Coleman 1974 Limited, (Respondents). (*Dismissed*).

0359-82-M: Drywall, Acoustic Lathing and Insulation Local 675 of the United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Readywall Ltd., (Respondent). (*Granted*).

0446-82-M: International Brotherhood of Painters and Allied Trades, Local Union 1891, (Applicant) v. Paolo Painting, (Respondent). (*Granted*).

0459-82-M: Drywall, Acoustic, Lathing and Insulation Local 675 of The United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Milani Drywall and Plaster Limited, (Respondent). (*Granted*).

0470-82-M: International Association of Bridge, Structural and Ornamental Ironworkers Local Union 721, (Applicant) v. Kinnean Industries Corporation Limited, (Respondent). (*Withdrawn*).

0531-82-M: Labourers' International Union of North America, Local 183, (Applicant) v. Special Foundation Systems Inc., (Respondent). (*Withdrawn*).

0556-82-M: International Union of Operating Engineers Local 793, (Applicant) v. 464734 Ontario Inc., (Respondent). (*Granted*).

0561-82-M: United Brotherhood of Carpenters & Joiners of America, Local Union #494, (Applicant) v. Masotti Construction Company Incorporated, (Respondent). (*Withdrawn*).

0606-82-M: United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. National Caterers Ltd., (Respondent). (*Dismissed*).

0607-82-M: Labourers' Local 1089 of L.I.U.N.A., (Applicant) v. Fabri-Tile Incorporated, (Respondent). (*Dismissed*).

0608-82-M: Labourers' International Union of North America Local 1089, (Applicant) v. Lummus Canada Incorporated, (Respondent). (*Withdrawn*).

0609-82-M: Labourers' International Union of North America, Local 506, (Applicant) v. Olympia and York Development Limited, (Respondent). (*Withdrawn*).

0617-82-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Antin Antinori Building Contractor Inc., (Respondent). (*Withdrawn*).

0623-82-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. H.A. Russell Construction Ltd., (Respondent). (*Withdrawn*).

0624-82-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Tobern Construction, (Respondent). (*Withdrawn*).

0625-82-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Climb Formwork, (Respondent). (*Withdrawn*).

0626-82-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1304, 1747, 1963, and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Convention & Show Services, (Respondent). (*Withdrawn*).

0644-82-M: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Standard Insulation Limited, (Respondent). (*Withdrawn*).

0645-82-M: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Feer Insulation Limited, (Respondent). (*Withdrawn*).

0657-82-M: Labourers' International Union of North America, Local 506, (Applicant) v. Vanbots Construction, (Respondent). (*Granted*).

0665-82-M: International Association of Bridge, Structural and Ornamental Iron Workers, Local No. 721, (Applicant) v. Toronto Door Systems Inc., (Respondent). (*Withdrawn*).

0695-82-M: United Brotherhood of Carpenters & Joiners of America, Local 38, (Applicant) v. Taro Properties Incorporated, (Respondent). (*Withdrawn*).

0750-82-M: United Brotherhood of Carpenters and Joiners of America, Local 1256, (Applicant) v. Hardrock Forming Co., A Division of 270915 Ontario Limited, (Respondent). (*Withdrawn*).

0723-82-M: Construction Workers Local 6, affiliated with the Christian Labour Association of Canada, (Applicant) v. Saltfeet Construction Ltd., (Respondent). (*Withdrawn*).

0733-82-M: United Brotherhood of Carpenters and Joiners of America, Local Union 93, (Applicant) v. Tantalus Construction Company Limited, (Respondent). (*Withdrawn*).

0734-82-M: United Brotherhood of Carpenters and Joiners of America, Local Union 93, (Applicant) v. Canadian Tire Corporation, Limited, (Respondent). (*Withdrawn*).

0747-82-M: Local Union 2486, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Ruggles Construction, Division of Ruggles Sales and Services Ltd., (Respondent). (*Withdrawn*).

0787-82-M: International Union of Operating Engineers Local 793, (Applicant) v. Archer's Crane Service, (Respondent). (*Withdrawn*).

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

1263-81-OH: Brenda E. Beattie, (Complainant) v. Auto Jobbers Warehouse Ltd., (Respondent). (*Denied*).

2543-81-R: Local Union 2486, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Ruggles Construction, Division of Ruggles Sales and Service Ltd., (Respondent). (*Denied*).

0503-82-R: Hotels, Clubs, Restaurants, and Taverns Employee's Local 261, (Applicant) v. Canada's Capital Building Services Limited, (Respondent). (*Denied*).

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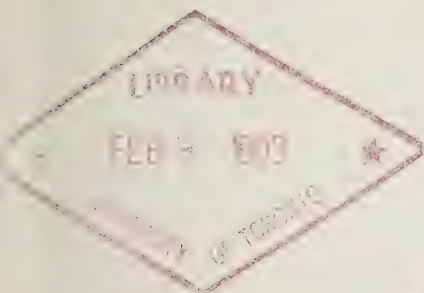
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0666-82-R International Association of Machinists & Aerospace Workers, Applicant, v. **Airgo Agency Limited**, v. Group of Employees, Objectors

Constitutional Law – Whether air-freight forwarding business within Board's jurisdiction – Whether interprovincial transportation – Operation not essential to air-transportation – Board finding operation local undertaking – Contact with customs and holding of agencies with airlines not changing status of local undertaking

BEFORE: M. G. Picher, Vice-Chairman, and Board Members W. H. Wightman and M. J. Fenwick.

APPEARANCES: *Joseph Atkinson for the applicant; E. L. Stringer, Q.C., B. Crosby, J. Drake, B. Michika and J. Shenkman for the respondent; Ian W. Taylor for the objectors.*

DECISION OF THE BOARD; September 17, 1982

1. This is an application for certification. The initial issue is whether the respondent's business, air freight forwarding, falls within the constitutional jurisdiction of this Board. The respondent submits that it does not.

• • •

3. The bargaining unit is not in dispute. Having regard to the agreement of the parties the Board is satisfied that all employees of the respondent in the City of Mississauga, save and except foremen and persons above the rank of foreman, office and sales staff, constitutes a unit of employees appropriate for collective bargaining. For the purposes of clarity, supervisors are deemed to be foremen.

4. The facts are not in dispute. All of the respondent's business is devoted to forwarding air freight. Except for a small segment of its business, said to be less than one per cent of its traffic out of Mississauga, the respondent's freight is shipped to destinations in other provinces and the United States. Its Toronto operation is part of a service that includes facilities in Montreal, Winnipeg, Calgary, Edmonton and Vancouver.

5. Typically, when a consignor in Toronto uses the services of Airgo Agency Limited (hereinafter "Airgo"), Airgo arranges for a local carrier to pick up the goods. It then assembles the consignor's goods with freight of other consignors and loads them into Air Canada containers. Airgo completes the necessary documentation and determines the shipment and routing.

6. The containers are then delivered to Air Canada which loads them on board its aircraft and carries them to their destination. Airgo has a contract with Air Canada for the guaranteed rental of cargo space on its flights, whether or not the space is used.

7. When goods are being shipped to a Canadian city in which Airgo has an office, its Toronto office will alert the destination office, with details of the cargo,

consignor and consignee and the number of the flight. This is generally done while the goods are in transit so that the receiving office can make arrangements to take delivery of the goods. At the receiving end Airgo will either arrange delivery to the consignee through a local carrier or for a pick up of the goods pursuant to the consignee's own arrangements. If the goods are destined beyond the city in which the Airgo office is located, Airgo generally arranges further transportation and delivery through a local surface carrier.

8. Airgo also ships to Canadian centres where it does not have an office of its own. If, for example, it ships a consignment to Halifax, it will arrange with a local air freight handler in Halifax to receive the goods and arrange for their forwarding and delivery.

9. Approximately 55 per cent of Airgo's traffic is international. Its U.S. and foreign shipments are handled through a contractual arrangement with Burlington Northern Air Freight, an American freight forwarding company based in California. Airgo has a truck and a warehouse in Mississauga which are bonded under the *Customs Act*, and part of its service for its customers includes the preparation of customs documentation and customs clearing, both in Toronto or at further destinations. A customs inspector is employed full-time to Airgo's Mississauga warehouse.

10. In addition to "selling" its own cargo space Airgo also acts as an agent for airlines, booking other air cargo space on their behalf.

11. The respondent's air cargo forwarding business is not unlike the freight forwarding business operating in the area of rail and trucking. By leasing containers and air cargo space and providing local warehousing and transportation services, as well as services in relation to customs, Airgo provides streamlined bulk air transport services. The volume and efficiency of its operations results in costs and delivery times that could not be achieved by individual shippers.

12. Aeronautics and aviation are federally regulated pursuant to the broad federal power described in section 132 of the *British North America Act (Re Regulation and Control of Aeronautics* [1932] A.C. 64 (J.C.P.C.)). It is not aviation, however, that the respondent asserts as the basis for the federal regulation of its labour relations. The respondent does not claim to be an air carrier. Rather, it bases its claim to federal jurisdiction on its involvement in interprovincial transportation.

13. Counsel for the respondent submits, however, that Airgo is so involved in interprovincial and international air transport as to be an integral part of the airline industry. He submits that it falls under federal jurisdiction as a federal undertaking within the meaning of section 92(10)(a) of the *British North America Act*, which provides:

In each Province the Legislature may exclusively make laws in relation to

• • •

(10) Local works and undertakings other than such as are of the following classes:

(a) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province.

14. Section 108 of the *Canada Labour Code* governs collective bargaining in federal areas of activity. It provides:

This Part applies in respect of employees who are employed upon or in connection with the operation of any federal work, undertaking or business and in respect of the employers of all such employees in their relations with such employees and in respect of trade unions and employer's organizations composed of such employees or employers.

15. The *Eastern Canada Stevedoring Limited* case [1955] S.C.R. 529; [1955] 3 D.L.R. 721 confirmed that an undertaking need not itself be one of those described in Article 92(10)(a) to be federally regulated. An undertaking or business is also federally regulated pursuant to that section if it operates sufficiently "in connection with any federal work undertaking or business". The issue in this application is whether the business of Airgo is so connected to interprovincial transportation or aviation as to fall under federal authority.

16. These issues have been previously addressed both by this Board and in the courts in railway cases. In *Ottor Freightways* [1975] OLRB Rep. Jan 1 the Board was called upon to determine whether a freight forwarding company operating by rail was in the federal or provincial jurisdiction with respect to labour relations. The company had terminals in Toronto and Ottawa and was involved in carrying freight to points in Quebec out of its Ottawa terminal. Goods were pooled in Toronto and loaded on freight cars bound for Ottawa, where they were unloaded and delivered in the respondent's trucks within a twenty mile radius of Ottawa, including Hull and Gatineau. The Board found that it did not have jurisdiction because the respondent's trucking operation crossed provincial lines. While it found that the company was an undertaking connecting provinces, the Board specifically rejected the alternative argument that the respondent's link to the Canadian Pacific Railway brought it within the federal jurisdiction as an undertaking integral to railways. The Board distinguished the *Stevedoring* case on the basis that stevedores perform a function essential to shipping and therefore are an integral part of it. It also declined to follow an earlier Board decision, *HWK Forwarding Ltd.* [1970] OLRB Rep. Mar. 1450, which had found a freight forwarding company to be an undertaking integrally connected with railways. The Board reasoned as follows (p.p. 4-7):

Thus, relying upon *Attorney-General for Ontario et al v Winner et al, Winner et al v S.M.T. (Eastern Ltd. et al* [1954] 4 D.L.R. 657 (J.C.P.C.); *Regina v Manitoba Labour Board ex parte*

Invictus Ltd. (1968) 65 D.L.R. (2d 517; *Re Tank Truck Transport Ltd.* (1961), 25 D.L.R. (2d 161; and *Regina v Cooksville Magistrate's Court, ex parte Liquid Cargo Lines Ltd.* (1965), 46 D.L.R. (2d) 700, we rule that the respondent's business is an undertaking that connects the Province of Ontario with the Province of Quebec and its labour relations is therefore regulated by the *Canada Labour Code*....

Therefore the Board must dismiss this application on the preceding basis and this basis alone. We would note that this has been the foundation to all the preceding Board decisions involving freight forwarding companies save for *General Truck Drivers' Union, Local 938 and H'WK Forwarding Ltd.* [1970] OLRB M.R. p. 1450; (See *General Truck Drivers' Union, Local 938 and Hendric and Co. Ltd.* [1965] OLRB M.R. p. 646; *Canadian Transportation Workers Union #197 and Wilson's Truck Lines Ltd. and General Truck Drivers' Union, Local 938* [1970] OLRB M.R. p. 204; *Teamsters Local Union 879 and Crown Moving and Storage, operated by Donald W. Murray Movers Ltd.* [1973] OLRB M.R. p. 119; and *David Beaton v General Truck Drivers' Union, Local 938 and Consolidated Fastfrate Ltd.* [1974] OLRB M.R. p. 269), and with all due respect, we cannot accept the reasoning outlined in the *H'WK Forwarding Ltd.*, decision *supra*, and cannot do so for the following reasons.

The panel in *H'WK Forwarding Ltd.* did not focus on the intrinsic interprovinciality of the company's activities in that case (and the nature of the business in that case did extend outside of Ontario on a regular basis) but rather rested its reasoning upon the *Eastern Canada Stevedoring Co.* case, *supra*, holding that the employees of the freight forwarder were integrally related to railways and railways are a federal undertaking in their own right. And, in fact, this is the second "leg" to the respondent's argument in the application before us today in that, Mr. Filion, counsel to the respondent, relied upon the *H'WK Forwarding Ltd.* case, *supra*, as well as a more recent case of the Board – *Teamsters Union, Local 938 and Centeast Auto Terminal Ltd. and Canadian Brotherhood of Railways, Transport and General Workers* [1974] OLRB M.R. 67, (a case which we believe correctly applied *Eastern Canada Stevedoring Co.*, *supra*, but a case involving facts that are substantially different than those before us.) But, we believe that when the constitutional law test in this area is applied to a freight forwarder's operation that exists solely within a Province, it cannot be said that such an activity forms an integral part of and is necessarily incidental to the operation of a railway as defined under the exceptions to "local works and undertakings" in section 91(10)(a) of the *British North America Act*. Rather we believe that, while none are on all fours with the facts at hand, cases like *Murray Hill Limousine Service Limited v Sinclair Batson et al* 66 C.L.L.C. 14,

143; *Re Colonial Coach Lined Ltd. et al and Ontario Highway Transport Board et al* (1967), 62 D.L.R. (2d 270; *Underwater Gas Developers Ltd. v. Ontario Labour Relations Board et al* (1960), 24 D.L.R. (2d) 673; *Bachmeier Diamond and Percussion Drilling Co. Ltd. v. Beaverlodge District of Mine, Mill and Smelter Workers' Local Union Number 913* (1962), 35 D.L.R. (2d) 241 (Sask. C.A.); and *Teamsters International Union Local 990 and North Shore Supply Co. Ltd.*, File No. 5791-74-R, more appropriately describe the relationship of freight forwarders vis-à-vis the railways – the relationship is one of convenience to freight forwarders and of an incidental or tertiary benefit to railways.

In *Eastern Canada Stevedoring Co.*, *supra*, the company's operations consisted exclusively of services rendered in connection with the loading and unloading of ships, pursuant to contracts with seven shipping companies and the work was carried on under the authority and supervision of the ships' officers. Therefore, the work that was being done was something that the companies engaged in the federal undertaking (navigation and shipping) had to have done for them and to this end they contracted another company and that company thereby became integrally related to them. Similarly in *Centeast Auto Terminal Ltd.*, *supra*, the Canadian National Railway had contracted with foreign automobile manufacturers to transport their automobiles to customers in Canada. And obviously, to fulfil this obligation Canadian National Railway had to unload and store the vehicles until they were picked up. But Canadian National Railway contracted out this integral function of their railway responsibility to a specialized concern, and the Board found, by reason of this contact – a contract that was a necessary aspect of the railway's business – that the specialized concern had become an integral part of and necessarily incidental to Canadian National Railway.

However, in the case before us Canadian Pacific Railway has not sought out the respondent and engaged it to perform an integral aspect of the railway's responsibilities. Rather, the respondent is primarily engaged in servicing its own customers (i.e., delivering their goods, etc.) and it has chosen to do this, in part, by rail as opposed to "over the road". Therefore while Canadian Pacific Railway obviously enjoys such patronage it is in no way an integral part of its operations. It is convenient but is in no way necessary or integral to the operation of a railway. In other words while it is convenient to the railways to have only one customer the primary purpose or benefit of freight forwarding is to serve the many customers who deal with the freight forwarders, and therefore the benefit flowing to the railways is only of a tertiary nature. (This perspective is very nicely developed in relation to airline limousine services in *Re Colonial Coach Lines Ltd. et al and Ontario Highway Transport Board et al*, *supra*, p. 277). Accordingly an enterprise cannot parasitically and unilaterally make itself an integral part of a

federal undertaking unless it is performing a service that is of a primary value to that undertaking and requested by the federal undertaking on that basis. In the facts before us the respondent has merely agreed to transport *its* customers' goods to some other geographical point and has elected to do this by rail. It could have elected to do it by truck or by air but chose the rail. This election is to its own benefit and convenience and is not an integral part of Canadian Pacific Railway's activities. (Canadian Pacific Railway is only a passive medium in the relationship with the respondent.)

Or another way to phrase this same perspective is to examine the primary purpose and function of the respondent's business. This perspective forces one to look to the respondent's customers – not to Canadian Pacific Railway. The respondent delivers matters to and from railroad terminals for the customers – not the railroad. In other words it [sic] primary value, or nature of the respondent's business, is that of a parochial delivery agent and only incidentally does the railroad become involved. It is this perspective which distinguishes these facts from *Letter Carriers' Union of Canada v Canadian Union of Postal Workers and M & B Enterprises Ltd.* [1974] 1 W.W.R. 452 (S.C.C.), where a trucking firm had been engaged by the Canadian Post Office to handle and collect mail. There the company was working for the Canada Post Office performing one of its functions and the company was therefore an integral part of that activity; (see also *City of Kelowna v Labour Relations Board of British Columbia and C.U.P.E., Local No. 338*, 74 C.L.L.C. 14, 207 (B.C.S.C.)). Whereas had the arrangement been one of numerous customers asking the trucking firm to deliver mail to the Post Office the relationship with the Post Office would have been quite collateral or secondary.

17. The same reasoning was applied by the Federal Court of Canada in *Re Cannet Freight Cartage Ltd and Teamsters Local 419* (1976) D.L.R. (3d 473 (F.C.A.)). The facts of that case more closely approximate the facts of this case. The employer did not itself engage in any interprovincial transportation, as the employer in *Ottor* did. It also provided loading and unloading services, as well as pick up and delivery services at both ends of an interprovincial rail shipment. The decision of Jackett C. J., quashing the decision of the Canada Labour Relations Board, contained the following reasoning: (at pp. 473–75):

The facts are not in dispute. The applicant is a company related to Cottrell Forwarding Company Limited, which company is engaged, as its name indicates, in a business of the class sometimes referred to as freight forwarding. Cottrell solicits freight from customers in the Toronto area for forwarding to western Canada and makes the necessary arrangements with Canadian National Railway Company for the transportation of such goods in carload lots; and the applicant picks such goods up by trucks operated by independent contractors and takes them to premises leased from Canadian Na-

tional where the employees in question remove them from the pick-up trucks on to its dock and load and stow them in the railway cars provided by Canadian National pursuant to the arrangements made by Cottrell. Cottrell makes all arrangements with the customers and Canadian National; and arranges for unloading, etc., at the other end.

Counsel for the union and the Board supported the Board's jurisdiction on the basis that the employees in question were employed upon or in connection with the operation of an interprovincial railway and, alternatively, on the basis that they were employed on an undertaking (the freight-forwarding operation) extending beyond the limits of a Province.

The first contention was based, essentially, on the fact that the employees in question are employed, in so far as their physical activities are concerned, in the loading of freight on railway cars for transportation by Canadian National, which operates an interprovincial railway, and was supported by reference to the *Reference re Industrial Relations and Disputes Investigation Act*, etc. case, [1955] 3 D.L.R. 721, [1955] S.C.R. 529, as well as to the recent decision of this Court in the *Butler Aviation of Canada Ltd. et al.* case (Court file A-172-74 [unreported]).

In my view, whether or not employees whose work is physically upon or in connection with a railway may be said to be employed "upon or in connection with" the railway within s. 108 read with s. 2 of the *Canada Labour Code* must be determined, keeping in mind the constitutional limitations on Parliament's powers in the labour field, having regard to the circumstances in which the work takes place. Clearly a person employed by the railway company to carry out a part of the transportation services provided to its customers falls within those words even though he does not physically come in touch with the right of way or rolling stock. Just as clearly, a person working for a local businessman in a Province does not fall within those words even though his work, in connection with that man's purely local operation, requires that he perform a large part or all of his services physically on the railway's right of way or rolling stock.

For example, if the railway has pick-up service in a city as a part of its overall transportation service, I should have thought that the employees concerned would be regarded as employed in connection with the railway. If, on the other hand, the railway merely supplies railway cars to its customers to be loaded by them and unloaded by consignees, I should have thought that the employees of the consignor, while loading the car for their employer, would continue, from a constitutional point of view, to be working upon or

in connection with their employer's business and would not *pro tem* become railway workers.

When the problem in this case is so approached, in my view, it is clear that the employees in question were not employed upon or in connection with the Canadian National Railway. They were employees of the applicant loading freight on a railway car under arrangements whereby the car was to be loaded by the shipper and not by railway employees.

I have even less trouble with the submission that the freight-forwarding operation was an undertaking connecting one Province with another or extending beyond the limits of a Province. Even if the applicant's activities and those of the Cottrell Company are viewed as integral parts of a whole, in my view they do not constitute an "undertaking" that falls within s. 92(10)(a) of the *British North America Act*, 1867 or within the definition of "federal work, undertaking or business" in the *Canada Labour Code*. In my view, the only interprovincial undertaking involved here is the Canadian National interprovincial railway. Clearly, a shipper on that railway from one Province to another does not, by virtue of being such a shipper, become the operator of an interprovincial undertaking. If that is so, as it seems to me, the mere fact that a person makes a business of collecting freight in a Province for the purpose of shipping it in volume outside the Province by public carrier, does not make such a person the operator of an interprovincial undertaking.

18. Counsel for the respondent submits that its operations can be distinguished from *Cannet's*, the principal factual distinction being the location of its other offices and warehouses in several provinces and the co-ordination that goes on between them. He argues that these aspects of the respondent's operations make its Mississauga branch part of interprovincial business and not a local operation or undertaking. This is clearly not so, however, whenever Airgo forwards freight to a Canadian centre, like Halifax or Moncton, where it does not have a terminal. Its shipments in those cases are virtually identical to the rail shipments forwarded by *Cannet*.

19. Is there a difference in kind because Airgo also forwards freight through an air carrier to destinations where it has its own local office and warehouse? We think not. When the principles in the *Ottor* and *Cannet* cases are applied to the facts the essential nature of Airgo's operations does not substantially differ. It is not an air carrier and does not itself provide an interprovincial transportation service. It contracts for that service with air carriers on behalf of its own customers. Save for its occasional service as a sales agent of cargo space for the airlines, Airgo is employed exclusively by its own customers and not by the airlines. It does not provide a service that the airlines themselves provide and as such cannot be said to be an essential or integral part of interprovincial and international air transportation. Nor is it an integral part of aeronautics. The fact that it operates a number of freight forwarding depots in a number of Canadian cities in several provinces does not change the essential character of what it

does at Mississauga, which is to operate a freight forwarding service that is a purely local undertaking within the meaning of section 92(10)(a) of the *British North America Act*. We are not persuaded moreover, that its involvement in customs transactions alters its fundamental status.

20. As noted above, in addition to selling the air cargo space which it leases for Air Canada, Airgo also acts as an agent for Air Canada and other airlines in the sale of their air cargo space and services. In this regard its services are not unlike those of a travel agent. Would this alternative dimension of its operations bring Airgo within federal jurisdiction? The characterization of such an employer for the purposes of constitutional law was considered by the Federal Court of Canada in *Canadian Air Line Employees' Association v. Wardair Canada (1975) Ltd. International Vacations Ltd. and the Canada Labour Relations Board* [1979] 2 F.C. 91 (F.C.A.).

21. In that case *International Vacations Ltd.* ("Intervac") sold charter air fares as an agent for Wardair. The Canada Labour Relations Board found it had no jurisdiction over the labour relations of Intervac, which it found not to be integrally related to the federal undertaking operated by Wardair. It concluded that the sale of airline seats on an agency basis was a purely local undertaking or business. That conclusion was upheld in the Federal Court of Appeal. At pp. 97-8 Jackett C. J. distinguished between sales services being provided by the air carrier itself and being contracted out to a local agent:

If the operator of an air carrier business has its own staff to "sell" space directly to potential passengers, such selling operation would ordinarily be an integral part of the air carrier business. However, where, as here, the air carrier, as it is required to do by regulation, sells its space "wholesale" to somebody who "retails" it, the selling activities of the air carrier cease when it has sold what it has to sell and the re-sale by the wholesaler is a local activity in the province where it occurs.

While it is not too clear to me on the evidence as to how it is accomplished, what Intervac does is make arrangements with Wardair, and to a lesser extent with other air carriers, whereby it acquires the right to confer on its customers the right to be passengers on the air carrier's aeroplanes. In my view, its position, as between the air carrier and the passengers, is not different, from a constitutional point of view, from the position of any ordinary travel agency. For the reasons given in the *Cannet Freight Cartage* case, for holding that persons performing services for a freight forwarder are not employed on or in connection with the railway by which the forwarder carries out its engagements with its customers, I am of the view that persons employed by Intervac as "customer representatives" are not employed on or in connection with air carrier undertakings by whose aircraft Intervac's customers are carried.

22. In our view the *Ottor*, *Cannet* and *Intervac* decisions provide clear authority for the disposition of the jurisdictional issue in this case. Airgo is a freight forwarding

company that is essentially a local undertaking that functions incidentally through the airlines. Its services are not essential to air transportation and cannot be said to be an integral part of it. Its contact with customs and with airlines do not clothe it with the status of a federal undertaking. It does not itself link one province with another or with any foreign country. Finally, the Board concludes that the agency relationship whereby Airgo sells air cargo services on behalf of airlines does not bring it within federal jurisdiction or alter its essential characterization as a local undertaking for the purposes of constitutional law.

23. For all of the foregoing reasons the Board finds that it has jurisdiction to hear and dispose of the instant application. The Registrar is instructed to list the case for continuation at the earliest available date.

ADDENDUM: September 21, 1982

1. In its decision of September 17, 1982, bearing on the issue of constitutional jurisdiction, the Board inadvertently failed to include its determination on the petition of the objecting employees and erroneously instructed the Registrar to list the matter for a continuation of the hearing. As is evident from the letter of counsel for the respondent dated September 20, 1982, no continuation of hearing is necessary.

2. Ian W. Taylor gave evidence respecting the origination and circulation of a petition in opposition to the application for certification. The evidence establishes that the petition was not management inspired or supported. Mr. Taylor learned of the union's application during his holidays, when he returned to the plant on Monday July 12th to check on the status of his vacation pay and a scheduled pay increment which he had not yet received. He was then vacationing at his grandmother's cottage on Lake Simcoe.

3. When he saw the Board's notice to employees of the application posted in the office in Mississauga he inquired of a supervisor what it meant. He was told that it was a union matter that could not be discussed by management. He then called the Board and was advised of the time limit in which a statement of opposition must be filed, the terminal date being July 14th, 1982. He drafted the petition the same day, obtaining six employee's signatures outside the plant, before returning to his family's cottage overnight.

4. The next day he returned to Mississauga to continue his efforts, spending the night at his home. He obtained two more signatures. The evidence establishes that Mr. Taylor's approach to employees was generally restricted to the parking lot of the Mississauga warehouse. The only exception appears to be with respect to the final signature which he obtained late on the 14th, having gone into the plant to tell the employee concerned that time was running out if he wished to sign the petition. That employee then came out and signed, as the others did, in Mr. Taylor's car in the parking lot.

5. There is no evidence before the Board to establish that management was aware of what Mr. Taylor was doing or in any way lent support to his efforts. Indeed the evidence before the Board is that management refused to discuss the issue of union

certification with him and that he was entirely alone in his endeavours. Moreover, Mr. Taylor impressed the Board as a candid and forthcoming witness.

6. Having regard to the evidence the Board is satisfied that the petition filed by Mr. Taylor is a free and voluntary statement of the employees who signed it.

7. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

8. The Board is satisfied that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made were members of the applicant on July 14, 1982, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act. Having regard to the evidence in support of the petition, however, the Board finds that this is an appropriate case for the confirmatory evidence of a representation vote.

9. A representation vote will be taken of all employees of the respondent in the City of Mississauga, save and except foremen and persons above the rank of foreman, office and sales staff. All employees of the respondent in the bargaining unit on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken will be eligible to vote.

10. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the respondent.

11. The matter is referred to the Registrar.

2026-81-M; 2582-81-4 International Union of Elevator Constructors, Local #50, Applicant, v. **Beckett Elevator Company Limited**, Respondent, v. National Elevator and Escalator Association, Intervener

Construction Industry - Construction Industry Grievance - Practice and Procedure - EBA's authority limited to purposes of bargaining and concluding agreement - Cannot impose internal grievance resolution procedure on non-member employer - Internal procedure Board's section 124 jurisdiction - Board not consolidating grievance with unfair representation complaint because of inadequate particulars

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members O. Hodges and J. Wilson.

APPEARANCES: *M. A. Green for the International Union of Elevator Constructors, Local #50; W. J. McNaughton and A. Hopkirk for Beckett Elevator Company Limited; W. Moran for the National Elevator and Escalator Association.*

DECISION OF THE BOARD; September 21, 1982

I

1. This is an application under section 124 of the *Labour Relations Act*. In an earlier decision in this matter, dated April 21, 1982, the Board referred to the applicant union as "Local 50", the respondent employer as "Beckett", the National Elevator and Escalator Association as the "NEEA", and the International Union of Elevator Constructors, the "parent" of Local 50, as the "International Union". For ease of reference, the Board will continue to do so.

2. Certain matters are not in dispute. The NEEA is the designated employer bargaining agency for a number of companies in the elevator industry including Beckett. The International Union is the designated employee bargaining agency. The NEEA has the statutory authority to bargain on behalf of Beckett by virtue of a Ministerial designation and section 143 of the *Labour Relations Act*. But Beckett is not a member of the NEEA nor is it a willing participant in this bargaining process. Beckett is a member of a rival employer association known as the Canadian Elevator Contractors Association ("CECA"). The CECA currently has no bargaining status. Apparently, the Minister of Labour originally designated *both* employer associations to represent their combined membership in bargaining with the International Union, but as the two rival associations were unable to compose their differences, the Minister re-designated the NEEA as the sole employer bargaining agency. It further appears that the NEEA is dominated by four large well established national companies: Dover, Montgomery, Otis, and Westinghouse. Many of the other companies represented for collective bargaining purposes by the NEEA (and more particularly identified in appendix C of the collective agreement between the International Union and the NEEA) are members of the CECA, the rival employer organization. And, of course, all of the companies represented by the NEEA for collective bargaining purposes are competitors in the marketplace to a greater or lesser extent. It is this fact which is really at the heart of the current dispute.

3. Pursuant to sections 142 and 143 of the Act, the designated employer and employee bargaining agencies have negotiated a province-wide agreement by which both Beckett, the direct employer, and Local 50, the local union, are bound. That agreement provides for a limited form of industry-wide “bumping”. Certain employees laid off by one employer bound by the agreement have a limited right to continue in employment by displacing certain other employees of *another employer* bound by the agreement. Thus, a reduction in work and consequent lay-off by one employer/competitor bound by the collective agreement, triggers a concomitant obligation on the part of *other* employer/competitors to absorb this surplus by displacing their own employees. While it is easy to understand the utility of such provision from the trade union’s point of view, one can also appreciate an employer’s lack of enthusiasm about absorbing his competitor’s surplus workers at the expense of his own employees. Moreover, if some firms are regularly on the “receiving end” of such transfers, or must absorb them at a commercially inconvenient time, it does not take much imagination to envisage the friction which may arise and the dissatisfaction with the industry-wide bumping provisions – especially since, we reiterate, the transferred employees may be those of a competitor. Bumping provisions are a common feature of many collective agreements, but it is somewhat unusual, even in the context of bargaining with an employer association, that employees of one employer can displace those of another.

4. This application under section 124 has its origin in a dispute between Beckett and Local 50 concerning the proper interpretation of the “bumping provisions” in the province-wide collective agreement. The substance of that dispute is not immediately relevant. It suffices to say that the union claimed that certain of its members should have been employed by Beckett after being laid off by other companies, and that Beckett’s failure to immediately employ them in accordance with the terms of the collective agreement, made Beckett liable to pay them compensation for the wages that they had lost. The union’s claim was asserted through the filing of a “grievance” under Article 14 of the collective agreement which reads as follows:

Article 14

GRIEVANCE AND ARBITRATION

14.01 Any difference of dispute regarding the application or interpretation of this Agreement or Local Agreements shall be settled locally between the Local Union and the Employer. Upon receipt of a written grievance the Employer Representative and the Union Representative shall meet within five (5) working days to settle the dispute. *In the event the matter cannot be settled on a local basis, then either the Union or the Employer shall submit the dispute to the Joint Industry Committee which it is hereby understood and agreed shall have the power to enforce its decision by mutual consent for protection of the public and the entire elevator industry.*

14.02 Within a period of seven (7) days after receipt of a dispute or grievance by the Joint Industry Committee, said Committee shall meet. If the Joint Industry Committee is unable to reach a decision or is deadlocked on the issue, then within a period three (3)

days thereafter, either party may submit the unresolved dispute to arbitration.

14.03 It is agreed that the Employers and the Unions may mutually agree to a permanent Impartial Arbitrator or panel of permanent Impartial Arbitrators for resolution of differences or disputes. *It is agreed that the Employers and the Unions may agree to waive the Joint Industry Committee step in the above procedure and may submit an unresolved difference or dispute directly to an impartial Arbitrator.*

14.04 It is understood that neither the Joint Industry Committee nor the Impartial Arbitrator shall have any power to add to, subtract from, or modify in any way any of the provisions of this Agreement.

14.05 The decision of the Impartial Arbitrator shall be final and binding upon all parties. The expenses of the Imperial Arbitrator shall be borne equally by both parties.

14.06 It is agreed that the time limits expressed in this Article may be extended by mutual consent of the parties.

(emphasis added)

5. Article 14 provides that if the local parties (i.e., in this case, Beckett and Local 50) cannot resolve their dispute between themselves, *either* of them shall refer the matter to a Joint Industry Committee ("JIC"). The JIC is composed of members of the two designated bargaining agencies: the NEEA and the International Union. There is no evidence that the individual employers bound by the agreement have any specific representation on the JIC, nor is there any evidence to indicate that the individual employers have any specific authority to appoint such members. The JIC is the creature of the International Union and the NEEA – the designated bargaining agents.

6. Local 50's bumping grievance was referred to the JIC in accordance with Article 14 of the collective agreement. The JIC was composed of representatives of the union, as well as A. Reistetter, the executive director of the NEEA, and two representatives from Dover and Otis, respectively. There is no evidence that Beckett had any input into the selection of those individuals. They represent the NEEA. Mr. A. Hopkirk, an employee of Beckett, appeared before the JIC to make representations, and disputed that Beckett was in breach of its obligations under the collective agreement. The JIC disagreed. The JIC decided that Beckett had indeed breached the collective agreement, and that it was liable to pay certain monetary compensation to several employees who, in the JIC's view, should have been immediately employed by Beckett. Beckett has refused to comply with this determination, and, in consequence, Local 50 has filed the instant application under section 124.

7. The matter referred to by Local 50 in its section 124 application is the purported refusal by Beckett to allow bumping as per Article 10.5 of the collective

agreement. Attached to the reference to the Board, and referred to therein, is a copy of the decision of the JIC finding that Beckett had failed to comply with a provision of the collective agreement, and ordering the payment of certain compensation to the employees affected. On its face, the reference to this Board under section 124 has several related aspects: that Beckett has failed to comply with its obligations under the agreement, that this default was raised in a grievance and referred to the JIC in accordance with the agreement, that the JIC agreed that there had been a contractual breach, and that Beckett still refuses to acknowledge its liability despite the JIC decision.

8. The applicant union takes the position that the JIC decision is binding in accordance with Article 14 of the collective agreement, and that this Board should direct Beckett to compensate the aggrieved tradesmen in the sum calculated by the JIC. Alternatively, the union argues that if the JIC decision is not a final and enforceable resolution of the dispute with Beckett, this Board should hear the grievance on its merits, and decide for itself, whether Beckett was in breach of the terms of the collective agreement. Section 124 gives the Board jurisdiction to entertain a grievance “notwithstanding the grievance and arbitration provisions in a collective agreement”; and the union argues that, if necessary, the Board should exercise that jurisdiction. The intervening NEEA also takes the position that the matter has been settled, that there is a final and binding determination in accordance with the terms of the agreement, and that this determination should be incorporated in a Board order and enforced without reference to the merits of the dispute. In the NEEA’s submission, the Board should not go behind the JIC decision, but simply enforce it.

9. The union and the NEEA further point out that the JIC is an effective “domestic” mechanism for resolving disputes between the parties without recourse to litigation and the formality inherent in the arbitration process. The JIC – unlike a board of arbitration – is composed of individuals with special knowledge of the industry and, being unfettered by legal formalism, is unable to render a speedy decision more consistent with the spirit and intention of the parties’ collective agreement. Indeed, as counsel point out, a number of JIC decisions appear in appendices to the parties’ collective agreement, and are intended to govern the relationship of the local unions and employers bound by it. Both the union and the NEEA submit that the Board should not lightly interfere with the decisions of the JIC, or adopt an approach which could undermine its effectiveness.

10. Counsel for Beckett conceded that the JIC decision was “final and binding”, but, in his submission it was not *enforceable* and this Board has no jurisdiction to enforce it. That is the position taken in Beckett’s reply. Counsel also argued that the matter of the enforceability and the effect of the JIC decision were entirely different matters from those raised in the union’s section 124 application and that he was unprepared to argue that point on the day fixed for the hearing. Counsel submitted that he needed time to consider the issue, and he was not prepared to say why, in his submission, a JIC decision was not enforceable, or to advance any reason why Beckett should so regard it. In his submission, the proper procedure was for the union to file a second grievance claiming non-compliance with the JIC decision. Only then would he address the matter directly. On the other hand, counsel contended that the Board could not deal with the merits of the grievance because there was a “final and binding” JIC

decision. In summary then, Beckett's assertion is that the JIC decision is not enforceable in the section 124 application as presently framed, and perhaps not at all; but on the other hand that this Board cannot consider the union's grievance on the merits because there is a "final and binding" JIC decision on the question. Later in the day, however, when dealing with Beckett's related application under section 151 of the *Labour Relations Act*, counsel for Beckett revealed that his argument with respect to the JIC decision would refer to whether it was properly constituted under the collective agreement. But once more, despite the strenuous objection of the other parties, he would not elaborate.

11. We might note at this point, as we did at the hearing, that we do not find Beckett's position very compelling. It is difficult to accept that a dispute has been "settled" and, therefore, is not arbitrable when it is obvious that it has not been settled at all because Beckett refuses to recognize or abide by the purported settlement. The reality is that there has been an alleged breach of the collective agreement, and, to date, the aggrieved employees have not been able to secure the redress to which they may be entitled if such breach has in fact occurred. Moreover, the legislative thrust of section 124 is plain: construction industry grievances generally should be resolved quickly – if necessary, by this Board and notwithstanding the grievance/arbitration provisions in the parties' collective agreement. In this context we do not think we should take an unduly technical approach to the grievance procedure if to do so would result in the defeat of an otherwise valid substantive claim, nor should we lightly accede to the submission that a party is "surprised" by an issue which appears to be raised in its own pleadings.

12. After the conclusion of the hearing in this matter, and upon a consideration of the issues raised, the Board decided, on its own motion, to solicit further representations from the parties on the potential effect of sections 142 and 143 of the *Labour Relations Act*. Those sections read as follows:

142. Where an employee bargaining agency has been designated under section 139 or certified under section 140 to represent a provincial unit of affiliated bargaining agents, all rights, duties and obligations under this Act of the affiliated bargaining agents for which it bargains shall vest in the employee bargaining agency, but only for the purpose of conducting bargaining and, subject to the ratification procedures of the employee bargaining agency, concluding a provincial agreement.

143. Where an employer bargaining agency has been designated under section 139 or accredited under section 141 to represent a provincial unit of employers,

- (a) all rights, duties and obligations under this Act of employers for which it bargains shall vest in the employer bargaining agency, *but only for the purpose of conducting, bargaining and concluding a provincial agreement...*

[emphasis added]

However efficacious the JIC procedure might be, the Board had some doubt whether the designated bargaining agencies could, by agreement, extend their influence beyond bargaining and into the ongoing administration of the collective agreement. The JIC is merely the alter ego of the union and the NEEA, and it has imposed what is said to be a binding settlement of a grievance – including a finding of liability and an award of compensation. Since the NEEA has the right to represent Beckett only by virtue of, and subject to, sections 139 and 143 of the Act, it was by no means clear to the Board that it could properly create a mechanism by which a “binding” settlement could be imposed upon an unwilling employer such as Beckett. Yet the effect of the JIC decision was an integral part of the arguments of both the applicant union and the NEEA. Hence, the Board’s request for further representations.

13. Before turning to the language of Article 14 (wherein the union and the NEEA find a binding determination which this Board has but to enforce, and Beckett finds a bar to our consideration of the grievance,) it may be useful to briefly sketch in the statutory considerations which may bear upon our interpretation of the parties’ agreement.

II

14. For some years commentators have suggested that instability in construction industry labour relations could be attributed to an unstable economic environment, and to unduly fragmented collective bargaining institutions. (See, generally: H. Carl Goldenberg, Q.C. and J. H. G. Crispo, Editors, *Construction Labour Relations*, Canadian Construction Association 1968; H. D. Woods “Memorandum on the Industrial Relations Features of the Problem” in H. Waisberg J. *Report of the Royal Commission on Certain Sectors of the Building Industry*, Queen’s Printer, Toronto, 1974; J. B. Rose, *Public Policy Bargaining Structure and the Construction Industry*, Butterworths, Toronto, 1980; and specifically, D. E. Franks, *Report of the Industrial Enquiry Commission Into Bargaining Patterns in the Construction Industry*, 1976.) The proposed solution was extended area bargaining, and the new province-wide bargaining scheme reflects a legislative acceptance of that prescription. In 1978, the Legislature fundamentally altered the structure of collective bargaining in the construction industry by introducing a system of province-wide bargaining, by trade, through employer and employee bargaining agencies designated by the Minister of Labour. Previously, the only way that an employer association could acquire bargaining rights was through the acquiescence of the employers concerned, or through the process of “accreditation” (sections 125 to 134 of the Act). In order to be accredited, the employer association had to show that it represented the majority of the employers, employing a majority of the employees represented by a particular trade union. In this respect, the procedure was roughly analogous to the certification of a trade union. Under the new system, however, there is no requirement for a showing of support. The Minister is given a broad authority to designate such employer or employee bargaining agencies as he sees fit in accordance with his own assessment of the requirements of the situation (which may, of course, include the representativeness of the employer association). But having endorsed the proposition that extended area bargaining is more conducive to industrial relations stability, the Legislature has also sought to protect the individual employer’s authority to deal with his own employees, subject to the terms of the province-wide collective agreement. The employer’s rights are vested in the designated bargaining

agency only for the purpose of collective bargaining and concluding a provincial collective agreement. The day to day relationships between the employer and his employees, the administration of the collective agreement, and the application of that collective agreement to the circumstances of individual employers, are all left for resolution at the local level – subject only to the injunction that there cannot be a local arrangement inconsistent with the provincial agreement (see section 146 of the Act). Thus, while recognizing the necessity of vesting considerable authority in the employer association for the purposes of collective bargaining, the Legislature has sought to limit that authority to the conduct of bargaining. In addition, the designated bargaining agencies are both under a statutory obligation to represent their constituents in a manner that is neither arbitrary, discriminatory, nor in bad faith (see section 151).

15. The new province-wide bargaining scheme is an attempt to reconcile different and potentially competing concerns: the need for extended area bargaining in order to promote industrial relations efficiency; and the desire to recognize, to some degree, the autonomy of the individual employer. Both objectives are important, and it is hardly surprising that the Legislature should attempt to strike a balance between them – especially since, on the “employer side”, the interests at issue may be much more diverse than on the “union side” where, by definition, all of the union locals represented by the designated employee bargaining agency must be affiliated to a common trade union parent (although even on the “union side” there is sometimes competition between locals and friction with the employee bargaining agency). The employers represented by the designated employer bargaining agency may be active competitors in the marketplace, with diverse and conflicting interests, and may not even be members of the employer association with the statutory right to represent them. Thus, the Statute provides that the employer association has the right to negotiate the agreement in the first instance, there is a prohibition against local arrangements, and the employer association has access to this Board under section 124/or section 89 in order to ensure that the system is being maintained and the agreement is being uniformly administered. By the same token, however, the local union (affiliated bargaining agent) and employer have access to this Board under section 124, the Statute restricts the role of the designated bargaining agents to “conducting bargaining and concluding a provincial agreement,” and there is a statutory duty of fair representation.

16. In the instant case, the NEEA clearly has the legal authority, by virtue of section 143 of the Act, to represent Beckett – but only in accordance with that section and, consequently, “only for the purpose of conducting bargaining and concluding a provincial agreement”. Article 14 of the collective agreement, however, includes a mechanism representing the union and the NEEA – but not Beckett – which in their submission can render a decision which is final and binding upon all parties. That decision can include a definitive interpretation of the collective agreement, a finding that there has been a breach of its terms, a direction that compensation be paid, and an order as to costs. But an individual employer like Beckett is unrepresented on the decision-making body. At most, such employer can, as Beckett did in this case, make submissions that it does not feel that there has been a breach of the agreement, or that the measure of damages is not that ultimately assessed by the JIC. There are none of the procedural or legal safeguards which would be available before this Board or a board of arbitration.

17. We have carefully considered the submissions of the union and the NEEA, and we are not unmindful of the valuable role which the JIC was played, and can continue to play in resolving labour disputes in the elevator industry. However, in our view, the thrust and intent of the legislation is clear: a designated employer bargaining agency cannot, through the process of collective bargaining itself or otherwise, extend its role beyond "the conduct of bargaining and concluding a provincial agreement". No doubt the designated bargaining agency will have an interest in the enforcement of such collective agreement, and such interest would give it status to appear in any arbitration proceeding involving that agreement. There is also a legitimate concern that the agreement be applied uniformly and not be undermined by contradictory local arrangements. Moreover, as a practical matter, if the designated employer and employee bargaining agencies are *ad idem* on the meaning of the terms which they have concluded, an employer bound by that agreement might be hard pressed to prove that they are wrong. JIC decisions might also provide some evidence of the parties' intentions, or, if duly incorporated by reference, may come to be terms of the contract. The parties may even find it necessary to amend the agreement during its operation to meet changing circumstances, and, subject to section 151, there is no reason why they cannot do so. However, to suggest that the designated bargaining agencies may have a role to play in interpreting the collective agreement is not to say that, through a mechanism of their own creation, they can reserve to themselves the exclusive right to determine whether the agreement has been properly applied or administered by an individual employer which is not a member of the employer association and has not delegated such authority to it. In this respect, the situation is quite different from the ordinary settlement of a grievance by the parties to a collective agreement which would preclude an arbitration of its merits. Here, in our view, the parties cannot bind a non-member such as Beckett or preclude arbitration. Accordingly, we cannot accept the contention of the union and the NEEA that Article 14 (via the JIC) generates a binding determination which this Board need only endorse and enforce. To accept that proposition would be to sanction a result which, in our view, is inconsistent with the scheme of the Act. We decline to do so. On the other hand, neither can we accept Beckett's assertion that the JIC process somehow derails a grievance or precludes arbitration of its merits – not least because this Board has plenary jurisdiction notwithstanding the grievance/arbitration provisions in the agreement and would be quite prepared to exercise that jurisdiction to avoid any technical morass of the kind adverted to by counsel for Beckett. The opening words of section 124 are intended to avoid such difficulties.

III

18. For the foregoing reasons, the Board finds that the interpretation urged on us by the union and NEEA would be inconsistent with the scheme of the Act. But is it even required by the terms of Article 14? The wording is by no means unequivocal. In contrast to the situation of an arbitrator whose decision, by Article 14.05, is expressly made "final and binding", by the provisions respecting the JIC:

In the event the matter cannot be settled on a local basis, then either the Union or the Employer shall submit the dispute to the Joint Industry Committee which it is hereby understood and agreed shall have the power to enforce its decision *by mutual consent* for the protection of the public and the entire elevator industry.

The words "by mutual consent" may be simply redundant, or alternatively, serve to reinforce the role of the designated bargaining agencies in controlling the disposition of local grievances – thereby raising, once again, the considerations set out above. If, on the other hand, the consent envisaged is that of the local or immediate parties to the grievance, then that conflict is avoided, but since Beckett has not clearly consented to abide by the JIC decision, there can be no basis for the argument that the matter has been resolved. Generally, we would be inclined to adopt that interpretation of the agreement which does not raise a potential conflict with the Act; however, we do not have to reach a final conclusion on this issue. Whether the JIC is unenforceable because of a conflict with the Statute, or because of an absence of consent, is, in our view, immaterial given the general jurisdiction of the Board under section 124. It suffices to find, as we do, that the union's grievance has not been resolved, and we are prepared to entertain it.

19. The section 124 application is therefore referred to the Registrar so that it can be listed for a further hearing on the merits.

IV

20. This application under section 124 was scheduled for hearing together with an allegedly related application under section 89 of the Act alleging that the NEEA had breached its section 151 duty of fair representation. Counsel for Beckett asserted that this fair representation complaint was intimately related with the section 124 application and the two proceedings should be consolidated. However, the alleged misconduct of the NEEA was not particularized at all, and counsel for Beckett was most reluctant to reveal the thrust of its case – other than the general suggestion that some impropriety could be inferred from the nature of the "bumping" clause, the structure of the JIC, or the apparent domination of the NEEA by major employers. On the other hand, the clause at issue in the section 124 application has been in place for some years, as has the system of bargaining which produced it. If Beckett had a concern about this process, it certainly did not move expeditiously to assert it; moreover, the collective agreement in question is up for renegotiation in the spring of 1982, and for the reasons we have already mentioned, we do not think the JIC can preempt local administration of the agreement. To the extent that the JIC was the focus of Beckett's complaint, the concern may be academic.

21. Had Beckett been more candid and explicit with the Board in setting out the thrust of its section 151 complaint, the Board might well have been more sympathetic to Beckett's plea to combine that complaint with the section 124 application. If there were clearly a common factual foundation for both proceedings, or if the relief requested in each was clearly interrelated, the Board might be more disposed to combine them. On the basis of the submissions before us, however, we are not convinced that a sufficient case for consolidation has been made out. Accordingly, the Board directs:

- (a) that the section 124 application be relisted for a hearing on the merits of whether Beckett has breached the collective agreement;

- (b) that the complaint alleging a breach of section 151 of the Act also be relisted for hearing, but not necessarily before the same panel of the Board; and
- (c) that in respect of the alleged breach of section 151 of the Act, the complainant, Beckett, forthwith furnish full particulars of any and all incidents which it alleges involve misconduct constituting or, supporting, a purported breach of section 151 of the Act.

(The attention of the complainant is directed to Rule 72 of the Rules of Practice.)

22. These matters are referred to the Registrar.

0641-82-R John D. Weed, Applicant, v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Local 419), Respondent, v. **Browning-Ferris Industries Ltd.**, Intervener.

Practice and Procedure – Termination – First termination application dismissed – Second application filed two weeks later – Applicant on second application not limited to events subsequent to dismissal of first – Board’s discretion to refuse to entertain not restricted to applications under permissive provisions of Act – First dismissal due to lack of employee support – Second application barred

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members J. A. Ronson and S. Cooke.

APPEARANCES: *John D. Weed on his own behalf; Douglas J. Wray and Bud Bodkin for the respondent; R. A. Werry and C. Wartman for the intervener.*

DECISION OF VICE-CHAIRMAN N.B. SATTERFIELD AND BOARD MEMBER S. COOKE; September 17, 1982

1. The applicant, John D. Weed, has applied under subsection 2 of section 57 of the *Labour Relations Act* for a declaration that the respondent International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Local 419) (“Local 419”) no longer represents the employees of Browning-Ferris Industries Ltd. (“the employer”) in the bargaining unit for which Local 419 is the bargaining agent. The application was made June 29th, 1982, Weed had made an earlier application on March 16th, 1982 which was dismissed by the Board, differently constituted, in a decision which issued June 14th. It was dismissed because the applicant failed to establish that it had the support of not less than forty-five per cent of the employees in the bargaining unit, the requisite support in order to be entitled to a representation vote in an application under section 57. As a result of the second application following on the

heels of the first, the respondent has requested the Board, in a letter dated July 6th, 1982, to exercise its discretion in clause (i) of section 103(2) of the Act to refuse to entertain the application and to impose a bar on any new applications with respect to the same employees pursuant to that section. The relevant sections of the Act provide as follows:

57.-(2) Any of the persons in the bargaining unit defined in a collective agreement may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit,

- (a) in the case of a collective agreement for a term of not more than three years, only after the commencement of the last two months of its operation;
- (b) in the case of a collective agreement for a term of more than three years, only after the commencement of the thirty-fifth month of its operation and before the commencement of the thirty-seventh month of its operation and during the two-month period immediately preceding the end of each year that the agreement continues to operate thereafter or after the commencement of the last two months of its operation, as the case may be;
- (c) in the case of a collective agreement referred to in clause (a) or (b) that provides that it will continue to operate for any further term or successive terms if either party fails to give to the other notice of termination or of its desire to bargain with a view to the renewal with or without modifications, of the agreement or to the making of a new agreement, only during the last two months of each year that it so continues to operate or after the commencement of the last two months of its operation, as the case may be.

(3) Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as is determined under clause 103(2) (j) that they no longer wish to be represented by the trade union, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

103.-(1) The Board shall exercise such powers and perform such duties as are conferred or imposed upon it by or under this Act.

(2) Without limiting the generality of subsection (1), the Board has power,

- (i) to bar an unsuccessful applicant for any period not exceeding ten months from the date of the dismissal of the unsuccessful application, or to refuse to entertain a new application by an unsuccessful applicant or by any of the employees affected by an unsuccessful application or by any person or trade union representing such employees within any period not exceeding ten months from the date of the dismissal of the unsuccessful application.

2. The respondent's request gave rise to a preliminary issue at the hearing as to the scope of circumstances which the Board would consider in deciding whether to exercise its discretion. For reasons given orally at the hearing, the Board refused the respondent's request to limit the circumstances to those matters arising between the dismissal of the first application and the making of the second one. (See the Board's decision in *Ontario Hospital Association (Blue Cross)*, [1981] OLRB Rep. April 468 at paragraph 19. The Board also ruled that it would hear evidence and argument on the bargaining relationship between Local 419 and the employer from the time notice to bargain was given in January 1982 until the date of the second application but it refused the employer's request to consider the bargaining relationship from when it was first established or to consider the number of representation applications which have been made during the relationship and prior to the first one at issue here. The Board did not consider these issues to be either relevant or helpful to it in deciding the exercise of its discretion.

3. During the course of hearing the parties' submissions on that issue, Weed alleged that there were further grounds why the Board should not refuse to entertain his application. These were that Local 419 had been party to a fraud on the Board and perjury by a witness at the hearing into the first application. Accordingly, Weed was seeking to have the Board take these allegations into account in deciding whether it would entertain the second application. The Board declined to make a finding either way as to whether the fraud and perjury allegations were relevant to the exercise of its discretion for several reasons. First, pursuant to the Board's discretion to determine its own procedures, it did not consider this proceeding to be the appropriate one for entertaining such allegations, since, to do so, the Board would need to have the same evidence before it as had the Board constituted to hear the first application. Second, section 106(1) of the Act is available to Weed in order to seek reconsideration of the first decision on the grounds of his allegations and would be a more appropriate proceeding for dealing with them. Third, absent proper notice to the parties about the allegations and the attendant problem of particulars, even if the Board was prepared to entertain the allegations, the circumstances in which they were raised were such that the Board would have had to grant an adjournment to the other parties were one to be requested. There is no doubt from the objection raised by counsel for Local 419 to the allegations that such a request would have been forthcoming had the Board agreed to entertain them. The Board, therefore, gave Weed the choice of:

- (a) seeking the Board's consent to adjourn the proceedings in order to apply for reconsideration of the decision with respect to his first application; or

- (b) continue with the proceedings whether or not he wished to seek reconsideration of the first decision.

Weed chose to continue the proceedings.

4. The submissions of counsel for the employer on the preliminary issue included the argument that the Board's jurisdiction under clause (i) of section 103(2) does not extend to those sections of the Act which are mandatory. His point of departure in the argument was the otherwise unsupported comment in the first paragraph of the decision of the dissenting member of the Board in *Chapleau Lumber Co. Ltd.*, [1973] OLRB Rep. Nov. 574, that:

"... Indeed, in view of the mandatory provisions of section 49 [now section 57] of The Labour Relations Act, I not only refrain from exercising a discretion in the manner of the majority but quare whether, in fact, such discretion should be exercised by the Board."

Counsel enlarged on his argument by contending that section 103(1) mandates the Board to "... exercise such powers and perform such duties as are conferred or imposed upon it or under this Act." Further, subsection 3 of section 57, the section under which this application was made is also mandatory and requires the Board to ascertain "... whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing ... that they no longer wish to be represented by the trade union, ...". If the Board ascertains that to be the case, subsection 3 also mandates the Board to satisfy itself by means of a representation vote "... that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.". Counsel contends that section 103(2) serves to clarify section 103(1), the guiding section with respect to the Board's general powers, and cannot be used to interfere with mandatory provisions of the Act like section 57. Furthermore, counsel submits, there is no need to apply section 103(2) of the Act in order to provide a finality to the Board's proceedings with respect to representation issues since section 61 controls the timeliness of such applications.

5. The Board does not agree with counsel. Section 103(2), clause (i) gives the Board the discretion to refuse to entertain *any* application for which the Act makes provision. If the Legislature intended the Board's discretion to be exercised only with respect to applications made under the permissive sections of the Act, it would have said so in clear terms and it has not. It follows, therefore, when the Board is exercising its discretion under clause (i) with respect to any application made under another provision of the Act, it is acting within its clear jurisdiction.

6. The Board turns now to whether it should refuse to entertain the application as requested by Local 419. When the Board has decided that question in the past, it has concerned itself with the need to balance the right of employees to select or dispose of a bargaining agent with the need to allow the employer and trade union who are parties to a collective bargaining relationship a period of stability and continuity in that relationship. In this respect, for a very helpful review of the Board's decisions wherein it has sought to balance these competing but equally significant considerations, see the Board's

decision in *Seven-Up (Ontario) Limited*, [1971] OLRB Rep. Dec. 792. At paragraph 16 of the decision the Board sums up this principle or policy in the following words:

The *Trinidad Leaseholds Case* and subsequent decisions based on its principles stand for the proposition that when a second application for certification or termination is made upon the heels of a prior application involving the same parties, in determining whether it should refuse to entertain the second application, the Board must balance the right to test an incumbent trade union's strength among the employees it represents at an appropriate time against the maintaining of continuity and stability in an existing collective bargaining relationship. Stated another way, once a representation issue has been dealt with on its merits and in the absence of special circumstances, then an incumbent trade union ought to be afforded a reasonable opportunity to demonstrate, without undue impediment, its ability to bargain with that employer for a collective agreement on behalf of those employees it represents.

7. The facts before the Board in the instant cases are that the first application was made by Weed on March 16th and dismissed by decision of the Board of June 14th. A fortnight later, June the 29th, the second application was made. Prior to the first application Local 419 had written to the employer on January 25th, 1982 serving notice that Local 419 desired to negotiate amendments to the collective agreement which was to expire on April 1st, 1982. The employer took the position in its letter dated January 29th replying to the notice, that the notice had not been given in accordance with the provisions of the collective agreement. The employer claimed that this failure to give notice according to the terms of the agreement resulted in the agreement being extended for a further term of 12 months until April 1st, 1983. Local 419 nonetheless sent its proposals for amendments to the collective agreement to the employer by letter dated March 4. In order to prepare its proposals, Local 419 had held a meeting of the employees of the employer on February 28th, pursuant to notice which had issued January 27th. Before Local 419 and the employer were able to resolve that issue, the first application was filed. It is common ground that the parties decided not to attempt to pursue the matter further pending determination of the application for termination of bargaining rights. Coincident with the Board's decision issuing on June 14th, Local 419 filed a Request for Appointment of a Conciliation Officer with the Ministry of Labour. The parties were advised by letter dated July 12th from the Assistant Deputy Minister of Labour that the Minister would be making the appointment of a conciliation officer which Local 419 had requested. It is also common ground that a conciliation officer was subsequently appointed, although the date of appointment is not in evidence. While Local 419's request for the appointment of a conciliation officer was being considered, the second application for termination of bargaining rights was made. That is the application before this Board. There were no meetings between Local 419 and the employer during which collective bargaining took place in between the dismissal of the first application and the making of the second one, except for the various discussions between Local 419 and the employer and between each of them and representatives of the Ministry of Labour relative to the appointment of a conciliation officer.

8. Counsel for the employer, in addition to his argument that the Board lacked jurisdiction to apply section 102(3), clause (i) to section 57 of the Act, submitted that

the Board has decided each case on its own particular facts and exercised its discretion when the facts revealed a good reason to do so and did not refuse to exercise it unless there was good reason to do so. He asked the Board to take into account that, when Local 419's notice to bargain was challenged as untimely by the employer, it failed to force the issue by applying for the appointment of a conciliation officer, thus leaving itself open for the second application for termination of bargaining rights.

9. Bearing in mind that this is a situation where the Board is being asked to refuse to entertain a second termination application in circumstances where the first was dismissed only two weeks previously for a lack of employee support. The Board's cases reviewed in *Seven-Up, supra*, make it clear that, in balancing the interests and rights of the employees to select their bargaining agent with the equally significant need for stability and continuity in the collective bargaining relationship, the Board has consistently refused to entertain the second application unless there are special circumstances which suggest that a better balancing would be achieved by allowing the second application. Those special circumstances have usually been ones in which the first application was dismissed for reasons other than a clear indication that they lacked adequate employee support. The Board's decision in *Ontario Hospital, supra*, refers at paragraph 22 to the kinds of circumstance giving rise to the dismissal of the first application in those cases where the Board has entertained an immediate second application. In one way or another, these were all cases in which the first application was dismissed for reasons other than a clear indication that it was lacking in employee support. There may be other special circumstances giving rise to dismissal of a first application which would cause the Board to be willing to entertain a second one, but the Board does not consider the circumstances of the instant case to be deserving of such consideration.

10. Weed argues that the employees want a representation vote to decide whether Local 419 should continue to represent them and to this end they have made two applications seeking the termination of its bargaining rights, both of them timely within the requirements of sections 57 and 61 of the Act. The union, which is the party raising the bar in opposition to the second application, was not sufficiently interested in the employees, he argues, to give timely notice to the employer to bargain a renewal of the collective agreement. The union's failure to give notice within the provisions of the collective agreement may or may not be symptomatic of the quality of its representation in the eyes of those employees who have made this application. There are good strategic or tactical reasons why any party to a collective agreement may decide to give notice to bargain at a particular point in time. The Board has not given any particular significance to the precise timing of when the union gave due notice in satisfying itself whether there exists a current and active collective bargaining relationship between that union and the employer. Furthermore, while Local 419's notice may have been untimely under the terms of the collective agreement, it was timely within the provisions of section 57(1) of the Act which provides that either party may give notice to bargain within the ninety days before the collective agreement ceases to operate. The Board has previously found that notice which satisfies subsection (1) of section 53 also operates to terminate the collective agreement on its expiry date and to entitle the party which has given the notice to bargain to engage in collective bargaining and to apply for conciliation even if the notice did not comply with the terms of the collective agreement. See *Otto's Deli*, [1980] OLRB Rep. Nov. 1673 at paragraph 16.

11. The fact the Local 419 gave notice to bargain which was timely under the provisions of the Act, followed up that notice by holding a meeting of the employees of the employer and subsequently prepared and referred to the employer proposals for amendments to the collective agreement, all point towards the existence of a current and active collective bargaining relationship. That appearance is not changed by the fact that the employer objected to the notice as being untimely, or that the employer and Local 419 decided not to pursue the matter further until the first application for termination of bargaining rights was decided. Local 419's application for the services of a conciliation officer made immediately upon the issuing of the Board's decision dismissing the first application reinforces further the fact that, whether or not the employer wanted to bargain, there was a current and active bargaining relationship at the time the second application was made.

12. Since the representation issue was raised by Weed in the first application and was dismissed on its merits and there being no special circumstances to be considered by the Board with respect to the second application which would cause it to deny the union a reasonable opportunity to demonstrate its ability to bargain with the respondent for a collective agreement on behalf of the employees it represents, the Board is of the opinion that it should exercise its discretion under section 103(2), clause (i) of the Act to refuse to entertain this application.

13. In the result, the application is dismissed.

DECISION OF BOARD MEMBER JAMES A. RONSON;

1. The applicant, John D. Weed, has brought a timely application for termination pursuant to subsection 2 of section 57 of the Act. The narrow issue before the Board is whether we should refuse to entertain the application in the exercise of the powers of discretion granted in section 103(2) (i) of the Act. The respondent union argues that we should follow our normal practice and refuse to hear this application which so closely follows a prior application by Mr. Weed. That earlier application was dismissed when the union filed what are generally termed "counter petitions" and, as a result, although Mr. Weed had filed evidence of the requisite support for his application the "counter-petitions" prevented him from proving that he had the support of not less than forty-five per cent of the employees in the bargaining unit. With the present application no such "counter-petitions" have been filed.

2. The intervener employer argues that the Board has no discretion to refuse to entertain an application under section 57(2) which is timely. The employer argues that since the Board in the first application did not see fit to bar Mr. Weed from making another application, then the present application must be heard and decided pursuant to the mandatory wording of section 57(3),

(3) Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit have voluntarily signified in writing at such time as is determined under clause 103(2) (j) that they no longer wish to be represented by the trade union, and, if not

less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated.

3. I have reviewed the decision of Fraser J. in *R. v. OLRB, Exp. TRW Electronic Components Ltd.*, [1970] 9 D.L.R. (3d) 669 (Ont. H.C.), and the dissent of Mr. J. Robinson, Q.C. (as he then was) in *Chapleau Lumber Co. Ltd.*, [1973] OLRB Rep. Nov. 574 and I must respectfully disagree with the majority in this case.

4. It is obvious that section 57(3) is a mandatory provision of the Act as that class is defined in the *TRW Electronic Components* decision. Unlike section 7 of the Act, section 57(3) even contains the specifics of what the Board is obligated to do, without reference to section 103. That being the case the Board has no discretion under section 103(2) (i) to interfere with the specific provisions of section 57(3). If the Board wanted to restrict the applicant from making further applications, it should have imposed a bar in its earlier order. That would have been a proper exercise of its discretion under section 103(2) (i).

5. In certification proceedings the Board imposes a bar on further applications only when a vote has been scheduled and the application withdrawn or a vote has been lost by the union. In that context it should be kept in mind that with applications for termination all the employees are asking for is a representation vote. Unlike certification, the Board cannot terminate under section 57(1) and (2) without a vote. When section 57(3) makes a vote mandatory providing all conditions have been met, the Board should hesitate to interfere with that cornerstone of the Act and by no means should set up "rules" regarding time bars using the discretionary powers found within section 103(2) (i).

6. It is noteworthy that in certification proceedings the bar to a further application is imposed in the order dismissing the previous. And this Board is markedly reluctant to refuse to entertain a subsequent application for certification even when an order imposing a bar has been made e.g. *Clorox Company of Canada Limited*, [1980] OLRB Rep. Feb. 184.

7. I would proceed to hear the evidence on the application in order to determine whether a representation vote should be held.

ADDENDUM OF VICE-CHAIRMAN, N.B. SATTERFIELD AND BOARD MEMBER S. COOKE;

1. The majority has the following comments to make having had the opportunity to consider the dissent of Board Member Ronson.

2. We agree that the decision of the court in *TRW, supra*, refers, in part, to section 7 of the Act as a section illustrative of mandatory sections of the Act. The decision cites section 6 also as one of the other sections "... drawn in a like fashion." We agree also that section 57(3) is of the same class of sections, but we disagree that section 57(3) differs from section 7 because it specifies the Board's obligations "...

without reference to section 103.”. Sections 7(1) and 57(3) both require the Board to make fact determinations with respect to the number of employees in the bargaining unit and the level of support the applicant has amongst those employees “... at such time as is determined under clause 103(2) (j) ...”. Section 57(3) requires the Board to hold a representation vote if the requisite number of employees support the application. Section 7(2) in a similar fashion requires the Board to hold a representation vote if the membership support is “... not less than 45 per cent and not more than 55 per cent of the employees ...” and gives it discretion whether to direct a vote if the membership support exceeds 55 per cent of the employees. Therefore, to the extent that subsection 2 of section 7 and section 57(3) both require the Board to hold a representation vote in a certain fact situation, they are not different. Thus, if the dissent is correct, the Board would not only lack jurisdiction under section 103(2) (i) to interfere with the specific provisions of section 57(3), it would lack jurisdiction to interfere with the specific provisions of subsections 1 and 2 of section 7 as well and, therefore, would have exceeded its jurisdiction in all of the decisions in which it has refused to entertain a new application for certification following an earlier unsuccessful one.

3. The corollary of the proposition that clause (i) of section 103(2) cannot be applied to interfere with the specific provisions of section 57(3), or as counsel for the employer submits, to any similar mandatory section of the Act, is that the clause can only be applied to discretionary sections of the Act. If that were to be the case, clause (i) would be a nullity, for, if a section of the Act already grants a discretionary power, it would be redundant to have to look as well to clause (i) of section 103(2) for that same power, particularly when the clause adds nothing specific as to how the discretion is to be exercised. The court observed in *TRW, supra*, that “... generally speaking where the Board is empowered to do something, the section or subsection indicates whether or not it is mandatory. It does not contemplate resort to [section 103(1)] for this purpose.”. Similarly, then, when a section of the Act gives the Board discretion with respect to an application under the Act, it does not contemplate resort to clause (i) of section 103(2) for the same purpose.

4. Each of sections 7(1) and 57(3) begin with the phrase “Upon an application ...”, making the application the event which triggers those actions mandated of the Board in either section. Were it not for clause (i) of section 103(2), there is no doubt that the Board would lose jurisdiction where, upon an application being made under either section, it failed to take the actions mandated. The effect of clause (i), in the absence of any express limits on its use, is to allow the Board to refuse to entertain an application under either section without losing jurisdiction.

5. The reference to the Board’s decision in *Clorox, supra*, implies that the Board’s standards for the exercise of its discretion under clause (i) with respect to the applications for certification differ from those applied to applications for termination of bargaining rights. That implication is not supported by the Board’s decisions. In *Clorox*, there was no incumbent trade union holding bargaining rights at the time the second application was made by a separate trade union, albeit the second applicant was related to the prior unsuccessful applicant. Similar circumstances prevailed in *Elm Tree Nursing Home*, [1978] OLRB Rep. Nov. 984, a decision referred to in *Clorox*, in which the Board entertained the second application. In neither case was there any need to balance rights of employees to test the support of an incumbent trade union and the desirability

of maintaining continuity and stability in an existing bargaining relationship, the standard which the Board applies when there is an incumbent trade union. The Board applies that standard to second applications where there is an incumbent trade union, whether it is an application for the termination of bargaining rights or an application for certification by which the applicant is seeking to displace the incumbent trade union. Indeed, the *Trinidad Leaseholds* decision referred to in *Seven-Up, supra*, which is the seminal case setting out the Board's exercise of discretion to refuse to entertain a subsequent application, involved a second application for *certification* which sought to displace an incumbent trade union.

0770-82-U International Union of Operating Engineers, Local 796, Complainant, v. **Cadillac Fairview Corporation Limited**, Respondent

Discharge for Union Activity – Unfair Labour Practice – Three employees discharged for alleged misconduct on picket line – All except grievor reinstated – Grievor's termination not because of union activity – Reinstatement denied because of past employment record – No violation

BEFORE: Kevin M. Burkett, Alternate Chairman and Board Members L. Hemsworth and P. J. O'Keeffe.

APPEARANCES: *George Surdykowski and Lawrence Wall for the complainant; Donald F. O. Hersey and John Findlay for the respondent.*

DECISION OF THE BOARD; September 23, 1982

1. This complaint has been filed under section 89 of the *Labour Relations Act* alleging a breach of section 66 of the Act. More specifically, the union alleges that Mr. L. Wall, employed as a plumber's helper at the Toronto Dominion Centre by the respondent company, was discharged by the company on June 11, 1982 because of his active support of a strike between the complainant union and the respondent employer which was then in progress.

2. Mr. John Findlay, the building manager of the Toronto Dominion Centre was called to testify. He took the decision to terminate Mr. Wall. He testified that he was called at home at about 5:00 a.m. on the morning of June 9, 1982 and told of an incident which had occurred earlier that morning. He was told that a garbage truck making a pick-up at the Toronto Dominion Centre had been damaged, the police had been called, and three of the striking employees on picket duty had been taken away by the police. He arrived at the Toronto Dominion Centre at about 6:00 a.m. and met with the assistant building manager, Mr. John McLeod. He was told that the grill of the garbage truck which was making the pick-up had been bashed, as had one of the doors, and that the windshield had been smashed. He was later informed that Mr. Wall, Mr. D. Shea, and Mr. P. Howlet, had been taken to No. 52 Police Station by the police officers who had been summoned to the scene.

3. The company employs the services of Intracon Security Ltd. and a number of its security officers were on duty at the Toronto Dominion Centre at the time of the above-described incident. Mr. Findlay received reports from three security officers. The first, as it pertains to the activities of Mr. Wall, reads as follows:

As the truck was attempting to make this second run, a male approximately 6' 2", husky build, long dark hair, beard, moustache, and wearing a black leather jacket and blue jeans picked up a green plastic milk crate and raised it above his head as he ran towards the truck as if to throw it at the vehicle. At this point, another striker, Maurice Branco approached the above gentleman and told him to get out of the way. As the truck reached the top of the ramp, my view was obstructed of the above males, one of whom cracked the truck windshield on the passenger side using the milk crate as witnessed by the truck driver, ...

The second report, insofar as it pertains to the activities of Mr. Wall, reads as follows:

When driver had waited for about four minutes at the line to leave, he began to "inch" forward, a man, 6' tall, with black hair, (long) beard, moustache and leather jacket threw a milk crate at the windshield and cracked it.

The third report, insofar as it pertains to the activities of Mr. Wall reads as follows:

At the above time and date the writer while on a perimeter patrol saw a striker with a black leather jacket pick up a green milk crate and throw it at a B.F.I. garbage truck which broke the windshield and bounced to the air and landed on the road.

Mr. Shea and Mr. Howlet were identified in these reports as the employees who damaged the grill and the door of the truck. Messrs. Wall, Shea and Howlet were detained by the police. All three employees were terminated. Mr. Wall received a letter dated June 11, 1982 advising him that his "employment with Cadillac Fairview Corporation Limited at the Toronto Dominion Centre had been terminated for just cause."

4. As part of the settlement to the labour dispute, the company agreed to reinstate into employment Messrs. Shea and Howlet, the two employees terminated along with Mr. Wall for their actions on the picket line on June 9th. The company refused to reinstate Mr. Wall. Mr. Findlay explained that the company refused to reinstate Mr. Wall because he had been an unsatisfactory employee. Mr. Findlay testified that Mr. Wall had been terminated in December of 1980 for causing a serious altercation at the company's annual Christmas party. He was subsequently reinstated on agreement of the parties with a two month suspension. Mr. Findlay testified that he did not make the decision to reinstate Mr. Wall at the time and, if the matter had been left up to him, would not have reinstated him. Mr. Findlay denied that his treatment of Mr. Wall was in any way motivated by his membership in the union, his participation in the strike or by a desire to in any way weaken the union or affect the course of bargaining.

5. Mr. Maurice Branco was called by the union. He is a shift electrician with six years' service with the company and was on the picket line during the early morning of June 9, 1982. He testified that as the garbage truck attempted to leave the Toronto Dominion Centre Mr. Wall, who was standing half way down the ramp with a milk crate in his hand, raised the crate over his head as if he was about to throw it. It is Mr. Branco's evidence that before Mr. Wall could throw the crate he asked him to put it down and that Mr. Wall did so and then jumped on the passenger side of the truck as it was exiting. Mr. Branco testified that Mr. Wall was in his sight for 90 per cent of the time and that he did not see him throw the crate. He acknowledged in cross-examination that Mr. Wall was the only person in the area wearing a black leather jacket and, other than for himself, a beard. He further acknowledged that the security officers may have seen something that he did not. Mr. Findlay did not speak with any of the three employees who were terminated or with any of the other bargaining unit employees on the picket line that evening, before deciding to terminate.

6. Mr. Wall, although present at the hearing, was not called to testify.

7. The company has had a collective bargaining relationship with the respondent union covering its operating engineers for twelve years and its maintenance employees for over two years.

8. Counsel for the respondent company reminded the Board that the issue in this case is not whether the company had just cause but rather, whether the company was in any way motivated in its decision to terminate Mr. Wall by anti-union considerations. Counsel for the company asks the Board to find on the evidence that Mr. Findlay took the decision to terminate solely on the basis of what he believed to be Mr. Wall's misconduct on June 9th and that he subsequently refused to reinstate Mr. Wall because of his past record. In these circumstances the company asks the Board to dismiss the complaint.

9. The union agrees that the issue before the Board is not one of just cause. The union argues that the employer has failed to discharge the statutory onus of establishing that its decision to terminate Mr. Wall was free from anti-union motivation. The union maintains that where, as in this case, the employer does not fully investigate and acts on incorrect information, and fails to set out the reason for the discharge in the letter of termination, an inference should be drawn that the action has been taken for reasons other than those put forward. The union asks the Board to find that Mr. Wall was not terminated for the reasons given but rather, for anti-union reasons.

10. This complaint is filed under section 89 of the Act and, in that it is alleged that Mr. Wall has been terminated from his employment for anti-union reasons, section 89(5) of the Act applies. Section 89(5) provides:

On an inquiry by the Board into a complaint under subsection (4) that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment, the burden of proof that any

employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization.

The substantive provision of the Act which the complainant alleges has been breached is section 66(a) which reads:

66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

(a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act.

11. It is now well established that in section 89 complaints where it is alleged that the employer has refused to employ or continue to employ a person because that person was or is a member of a trade union, or was or is exercising any right under the Act, the employer must establish that the reasons given for the refusal to employ are the only reasons and that these reasons are not in any way tainted by anti-union motivation. (See *Winchester Press Limited* [1982], OLRB Rep. Feb. 284, and the cases cited therein.)

12. The evidence in this case establishes that the person who made the decision to terminate Mr. Wall believed that Mr. Wall had engaged in serious misconduct on the picket line. He had before him three security reports, two of which identified a man fitting the description of Mr. Wall as having smashed the windshield of the garbage truck as it attempted to leave the Toronto Dominion Centre premises. Mr. Wall's keys and identification had been returned to Mr. Findlay as belonging to one of the three bargaining unit employees who had been taken to No. 52 Police Station. Was the discharge of Mr. Wall solely in response to Mr. Findlay's understanding of what he had done on the picket line, or, as is argued by the union, was the incident on the picket line used as a pretext to discharge Mr. Wall for anti-union reasons? There was no evidence led to establish that Mr. Wall acted as a steward, was on the negotiating team or otherwise played any leadership role within the union. For purposes of determining if the employer was in any way motivated by anti-union considerations, therefore, Mr. Wall was but one of a number of rank and file employees who actively supported the strike. There is no suggestion that the company acted against any of these other employees for anti-union motives. Furthermore, there is no evidence of any prior anti-union activity by the employer during the course of its long-standing relationship with the applicant union. In these circumstances and in the face of what Mr. Findlay clearly believed to be an act of serious misconduct by Mr. Wall we are satisfied that the discharge of Mr. Wall, although it occurred during a lawful strike, was directly the result of Mr. Findlay's belief that Mr. Wall had committed serious misconduct on the picket line; misconduct which is not in any way protected by the *Labour Relations Act*. Mr. Findlay may have been predisposed to deal with Mr. Wall in a harsh manner, because of his previous experience with him. However, even if he was so predisposed the evidence is that he acted without anti-union motivation and we so find.

13. Similarly, it must be found on the evidence that the decision of Mr. Findlay to reinstate Messrs. Shea and Howlet, but not Mr. Wall, was not motivated by anti-union considerations. We are satisfied that Mr. Findlay took the position that he did with respect to the reinstatement of Mr. Wall, on the basis of his employment record and in particular his behaviour at the December 1980 company Christmas party. Messrs. Shea and Howlet were not burdened with prior incidents of this type and accordingly were treated differently.

14. Having regard to all of the foregoing, this complaint is hereby dismissed.

0111-82-R United Brotherhood of Carpenters and Joiners of America Local 1316, Applicant v. Can-Am Acoustics Limited, Respondent, v. Group of Employees, Objectors

Natural Justice – Petition – Practice and Procedure – Reconsideration – Petitioners not given notice of hearing – Petition not affecting degree of union support even assuming voluntary – Board issuing decision and giving petitioners ten days to make written submissions – Petitioner’s counsel alleging breach of natural justice – Not making any submissions nor leading any evidence at subsequent hearing – Board confirming decision and issuing certificate

BEFORE: D. E. Franks, Vice-Chairman and Board Members R. J. Swenor and H. Kobryn.

APPEARANCES: *David McKee, James Caron and Rick Harkness for the applicant; Anthony Little for the respondent; Geoffrey M. Smith for the group of employees.*

DECISION OF THE BOARD; September 20, 1982

1. By a previous decision of the Board dated June 28, 1982, the Board certified the applicant trade union as bargaining agent for certain of the employees of the respondent company subject to the conditions set out in paragraph 5 of its decision. That paragraph reads as follows:

“5. There was also filed in this application a statement of desire to make representations by three employees. It appears that, although the Board acknowledged receipt of the statement of desire, the objecting employees were not given notice of the hearing in this matter. At the hearing in this matter, counsel for the respondent raised this issue with the Board suggesting that unless the objecting employees were given an opportunity to make their representations, there would be a denial of Natural Justice. We note, however, that the names of the three objecting employees do not correspond to any of the names on the written evidence of membership filed by the

trade union in this matter. It would thus appear that even had the employees been given notice of the hearing and been able to attend, the Board would not have conducted its usual inquiry into the origination, preparation and circulation of the documents filed since the documents could not possibly change the representative status of the applicant trade union. Nevertheless, these employees ought to have been notified of the hearing so that they could attend and make their representations to the Board. In view of the foregoing, we propose to issue a decision in this matter at the present time. However, copies of the present decision will be sent to the objecting employees and the objecting employees will be given ten days in which to make whatever representations they might wish to make to the Board in writing. As noted above, the representations will not affect the representative status of the applicant trade union. If the objecting employees make these representations we will consider them in a subsequent decision of the Board. However, if they fail to make any representations within the allotted time the Registrar will issue the Board's certificate in the present case."

Subsequent to the release of the Board's decision, a letter was received from counsel for the group of objecting employees. As a consequence of that decision the Board directed the Registrar not to issue the certificates and set the matter on for hearing to allow counsel for the objecting employees to make his representation.

2. The letter from counsel for the group of employees dated July 7, 1982 reads as follows:

"We have been retained as solicitors by Kenneth Gibson, Michael Gibson and Brian Arnsby, the objecting employees with respect to this Application.

Our clients have provided us with a copy of the decision rendered by the Board in this matter, dated June 28th, 1982.

We have been informed by our clients and note from paragraph 5 of the Board's decision that these objecting employees were given no notice whatsoever with respect to the hearing held before the Board with respect to this Application for Certification. It was the intention of the employees when they filed their Statement of Desire to participate in the Application process and be present and make submissions at any hearing in this matter. The failure to give notice to such employees with respect to the hearing obviously effectively denied them any such opportunity.

It is the opinion of the writer that the failure to give notice to these employees constitutes an obvious denial of natural justice. Once the Board decided to hold a hearing respecting this Application, we believe that at the very minimum, they were required to give notice of such hearing to all parties and allow them to be present and participate at such a hearing.

And we would suggest that allowing (or requiring) one party to submit written submissions on an Application is unfair to all parties involved. The party so allowed is denied the opportunity to be present and personally make submissions and arguments to convince the Board of its position. The other parties, however, also lose the opportunity to test the veracity of the written submissions by cross examination or other means. The Board is left with the unhappy prospect of comparing uncontradicted written submissions obtained at a subsequent date to the viva voce evidence tendered at the hearing. We would further suggest that, especially in these economically uncertain times, that justice not only be done, but that it also be seen clearly to be done. Our clients are very anxious to participate in the democratic process adhered to by the Board and have great difficulty understanding that they can be denied the right to appear and be heard.

We request on behalf of the objectors that the decision to certify be set aside and that the Application be re-initiated in order to provide the proper opportunity to the objectors to appear before the Board to present their case. We further submit that as we are informed by our clients that the make up of the employees continues to change, and as there will be some delay before a new hearing can be held, that a new date be set with respect to ascertaining membership of the Union under the Labour Relations Act.

We would advise that should a new and original hearing be denied, an Application for Judicial review will be brought on behalf of these objecting employees. We would submit that, as our clients are of modest means, and as the Board's decision itself seems to acknowledge in paragraph 5 a denial of natural justice, a new hearing by the Board would be the most advantageous way to proceed with this matter.

We ask you to give the matters raised in this correspondence your serious consideration and look forward to hearing from you."

Copies of that letter were sent to the other parties and replies were received from the applicant and the respondent and a further letter was received from counsel for the objecting employees. The position taken by counsel for the objecting employees is reiterated and expanded in his reply to the position taken by the applicant in a letter dated July 30, 1982 that reads as follows:

"We acknowledge, with thanks, receipt of a copy of correspondence from Mr. David McKee, the counsel for the applicant in the above-noted application. We wish to respond briefly as follows.

Firstly, we wish to reiterate our original submission that the failure to provide the objecting employees with notice of the hearing held in this matter constitutes an obvious and substantial denial of Natural

Justice. We would submit that the authorities are clear insofar as they provide that a minimum standard of the Audi Alteram Partem Rule is that all parties to a proceeding are to be provided with notice so as to allow them to be present at any hearing being conducted.

It is the submission of the writer that there are certain elements of this Rule which cannot be disputed. One is that all parties are to be given the opportunity to correct or contradict evidence or submissions prejudicial to their views. A second one is that each party must be provided with knowledge of the arguments and evidence presented in order to allow them to participate in a meaningful fashion in the decision making process.

We believe it obvious that the objecting employees in this application were denied these basic rights and opportunities.

The solicitor for the applicant suggests that the objecting employees be denied the opportunity to make oral submissions. This, in our submission is to suggest that the objecting employees be denied Natural Justice. To allow one party a full and complete oral hearing while restricting another to written submissions presented at the hearing is, we submit, simply unjust.

The applicant suggests that oral submissions are unnecessary as the Board has indicated that it has already made up its mind. With the greatest of respect, we submit that the Board was in error in making such a decision. It could not be anticipated by any of the participants what the content of the evidence or submissions of the objecting employees would be (or would have been). Certainly these employees intended to play a meaningful role and attempt to persuade the Board that certification should not be allowed to take place. It is therefore submitted that the Board cannot reasonably say that their absence was insignificant and that subsequently allowed written submissions would not have any bearing (as indicated in its written decision).

We agree that these matters should be dealt with as expeditiously as possible and it is for this reason that we suggest that the Board reinstate the within application at the earliest opportunity. To do less, however, would in our submission validate a result and a proceeding which has been unfair to the objecting employees and one which is contrary to the established standards of Administrative Law.

We look forward to your reply."

3. The matter came on for a hearing on Thursday, September 2, 1982. At the hearing in the matter, counsel for the group of employees reiterated his position that the Board's decision of June 28th constituted a denial of Natural Justice. However, he had no further representations beyond this and those set out in his letter which he wished to

make to the Board. He did not seek to adduce any evidence or make any representations which he could have made had his clients received proper notice of the first hearing or had they been present at the previous hearing of the Board. Further, he had no representations or evidence to call on the very specific questions as to whether a new terminal date should be set or an application date, other than the one already on file should be used, although presumably his request in the first letter is indeed a request to set a new terminal date. However, he had no further submissions on these issues.

4. The Board pointed out to counsel for the employees that evidence of membership and evidence of opposition to certification such as the petition filed by his clients are confidential for the use of the Board by virtue of section 111 of the Act. Further, it was pointed out by the Board, that in its decision of June 28th, the Board had for purposes of that decision accepted the petition as filed as a voluntary statement of the persons who signed it, but noted that the names on the petition did not at all cast doubt upon the amount and degree of membership support enjoyed by the applicant trade union. Counsel for the employees had no representations to make nor did he wish to call any evidence in relation to these matters.

5. Having heard the representations of counsel for the group of employees, the Board hereby affirms the findings set out in its decision dated June 28, 1982 in this matter and directs the Registrar to issue the certificates described in that decision as of September 2, 1982. We have not been given, nor do we see any reason in the circumstances of the present case for using either a different application date, which sets the list of employees in the bargaining unit, or for changing the terminal date which sets the date by which the representative position of the applicant trade union and those objecting to the application is determined.

6. Contrary to the submission of counsel for the group of objecting employees, there is no reason to commence these proceedings over again. The Board by scheduling a second hearing, has given the objecting employees and their counsel every opportunity to make representations and to call evidence to issues raised by the union's application for certification. Counsel chose not to call evidence when asked by the Board if he wanted to do so. The sum and substance of the representations by counsel for the objecting employees is that the Board somehow denied them Natural Justice in proceeding at the previous hearing. At that hearing, as noted in paragraph 5 of its decision of June 28th, the Board treated the petition by giving it the maximum possible weight. That is, even if the petitioners were there and demonstrated that there had been no management influence as to the origination, preparation, and circulation of that petition, the petition would not have reduced the representative status of the applicant trade union. With respect to the issues of voluntariness of the petition and degree of membership support enjoyed by the Union, they were not prejudiced by not having been given notice of and actually attending at the hearing. In any event, even if the employees were prejudiced by the failure of the Board to give the notice, any such prejudice was cured by conducting the second hearing and permitting counsel for the employees to present evidence and make submissions on the issues in the applications. Counsel for the employees did not suggest any way in which this application would have been disposed of differently had his clients been present at the first hearing notwithstanding several invitations from the Board to him to do so.

7. For the foregoing reasons, the Registrar as noted above is directed to issue the certificates directed in the Board's decision of June 28, 1982. These certificates are to be dated September 2, 1982.

0949-82-R Labourers' International Union of North America, Local 1036, applicant, v. **Common Construction Company Ltd.**, respondent

Certification – Construction Industry – Employer's work in Ontario irregular and limited – Employer located in Quebec – Not reasons to deny certification

BEFORE: R. A. Furness, Vice-Chairman, and Board Members J. Wilson and C. A. Ballentine.

DECISION OF THE BOARD: September 3, 1982

1. In this application for certification the applicant filed four combination applications for membership and receipts. The combination applications for membership are signed by the employees and the receipts are countersigned and indicate that a payment of \$1.00 has been made within the six month period immediately preceding the terminal date of the application. The money was collected by more than one person. The applicant also filed a duly completed Form 80, Declaration Concerning Membership Documents, Construction Industry.

2. The respondent filed a reply, but failed to file a list of employees and specimen signatures within the time fixed in accordance with the *Labour Relations Act* and the Board's Rules of Procedure.

3. The respondent has filed a reply and has consented to the application being disposed of by the Board without a hearing by the Board and has made the following representations:

"Our irregular and limited presence in Ontario does not justify such an application and makes almost impossible the negotiation of a collective agreement, such as the one presently in force in Ontario. However, we are opened [sic] for discussion and suggestions."

The respondent has also stated in its reply that the appropriate unit would be restricted to general labourers in the Board's geographic area 21 and has alleged that all labourers residing in Quebec are subject to the Quebec Construction decree and are therefore automatically unionized. In paragraph 13 of its reply the respondent has stated:

"1) Our presence in Ontario is limited to one or two contracts per year for a maximum duration of one to two months and involves a maximum of 10 employees at all time.

- 2) The Quebec Construction decree prevails at all times for these general labourers."

The fact that the respondent works in Ontario on an irregular and limited basis is not a reason under the Act for denying certification to the applicant. With respect to the limited form of the bargaining unit proposed by the respondent, the applicant has demonstrated its entitlement to a unit in accordance with the provisions of section 144 of the Act and the Board finds no reason to depart from granting to the applicant the bargaining unit to which it is entitled under section 144. The fact that labourers residing in Quebec are subject to a construction decree has no effect on proceedings within the province of Ontario and whereas the Quebec construction decree prevails at all times, such a decree is in effect only in the province of Quebec. The applicant is entitled to have its request for certification considered under the laws of Ontario despite the fact that the respondent is based in the province of Quebec and apparently normally carries on its business in that province. In fact, upon certification the respondent may become automatically bound by the collective for the industrial, commercial and institutional sector of the construction industry with respect to construction labourers.

4. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act* and is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 139(1) of the Act on September 6, 1978, the designated employee bargaining agency is The Labourers' International Union of North America and The Labourers' International Union of North America Ontario Provincial District Council.

5. The Board further finds that this is an application for certification within the meaning of section 119 of the *Labour Relations Act* and is an application made pursuant to section 144(1) of the Act which provides that:

An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in clause e of section 117 shall be brought by either,

- (a) an employee bargaining agency; or
- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection 3 or by voluntary recognition.

6. The Board further finds, pursuant to section 144(1) of the Act, that all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all

construction labourers in the employ of the respondent in all other sectors in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foreman and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

7. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on August 27, 1982, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

8. Section 144(2) of the Act, which states in part as follows, provides for the issuance of more than one certificate if the applicant has the requisite membership support:

..., the Board shall certify the trade unions as the bargaining agent of the employees in *the bargaining unit* and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

(emphasis added)

Therefore, pursuant to section 144(2) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of the employee bargaining agency named in paragraph 3 above in respect of all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

9. Further, pursuant to section 144(2) of the Act, a certificate will issue to the applicant trade union in respect of all construction labourers in the employ of the respondent in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

0915-82-U CONSOLIDATED-BATHURST PACKAGING LIMITED

Applicant, v. Canadian Paperworkers Union Local 595; Canadian Paperworkers Union Local 343; Canadian Paperworkers Union; Garry Buccella; Energy and Chemical Workers, Local 29; and Energy and Chemical Workers, Local 20, Respondents

Remedies – Strike – Unfair Labour Practice – Customers of struck employers increasing purchases from applicant – Unions claiming applicant performing struck work and picketing applicant's plants – Applicant's employees honouring picket lines – Whether picketing protected activity as being "in connection with" lawful strike – Whether applicant "ally" of struck employers – Extent of regulation of picketing by Act

BEFORE: George W. Adams, Q.C., Chairman, and Board Members F. S. Cooke and W. H. Wightman.

APPEARANCES: *Michael Gordon for the applicant; and Paul Cavalluzzo and Martin Levinson for Energy and Chemical Workers, Local 29 and Local 20 and Barry Adams and Harold Caley for Local 595 and Local 343 of the Canadian Paperworkers Union and for the Canadian Paperworkers Union and Garry Buccella.*

DECISION OF GEORGE W. ADAMS, Q.C., AND W. H. WIGHTMAN; September 9, 1982

1. This is an application for a direction under section 92 of the *Labour Relations Act* wherein the applicant desires the Board to make a cease and desist direction with respect to picketing experienced at its four plants in Ontario located at Whitby, St. Thomas, Hamilton and Etobicoke. It will also be considered as a complaint under section 89. See *Genaire Ltd. et al* (1958) CLLC 15388.

2. Collective agreements are currently in force at all these locations with the International Woodworkers of America (hereinafter referred to as "I.W.A.") and its Local 2-242 (Whitby); 2-76 (Etobicoke); 6-29 (Hamilton); and 2-337 (St. Thomas). These collective agreements do not expire until December 31st, 1982.

3. The plants produce corrugated boxes as do other plants of the applicant located in New Brunswick, Quebec and Manitoba. We were advised that other large companies in this industry include Domtar Packaging Limited (hereinafter referred to as "Domtar"); Canadian International Papers (hereinafter C.I.P.); Kruger Containers; McMillan Bloedel; Atlantic Packaging; Select Containers; Brock Containers; and Standard Paper. Not all of these operations are unionized. However, C.I.P. has collective bargaining relationships with both the Canadian Paperworkers Union (hereinafter referred to as "C.P.U.") and with the Energy and Chemical Workers Union (hereinafter referred to as "E.C.W.U."). Domtar has collective bargaining relationships with the C.P.U. and its various locals and this is also the case for McMillan Bloedel, Atlantic Packaging and Standard Papers. Like the applicant, Brock Containers has a collective bargaining relationship with the I.W.A. The evidence reveals that collective agreements between Domtar and the C.P.U. for Domtar's Ontario plants expired May

31st, 1982 and a strike has been in progress since early July. C.I.P. collective agreements expired May 31st, 1982 and a strike has also been in progress with respect to that company's plants since early July. Collective agreements for McMillan Bloedel expired June 16th, 1982 for the London and Guelph areas and on August 15th, 1982 for Rexdale, Ontario. McMillan Bloedel is now involved in a strike with its unions. Accordingly, Domtar, C.I.P. and McMillan Bloedel are being lawfully struck by the C.P.U. and the E.C.W.U. whereas Consolidated-Bathurst plants along with plants of various other unionized companies mentioned above are continuing to operate under collective agreements which do not expire for some period of time.

4. The applicant complains of and seeks relief against the disruptive effects of picketing emanating from these strikes on the basis that it is a wholly unconcerned or neutral third party. Recently, the Board has begun to flesh out its jurisdiction to regulate picketing and other secondary actions causing unlawful strikes. See *Sarnia Construction Association et al*, [1982] OLRB Rep. June 922. The instant case represents another occasion for outlining some of the general principles that pertain to this jurisdiction. Indeed, the facts before us raise particularly striking issues of policy in this area.

5. *Whitby Plant*

Picketing was experienced on August 13th at Whitby. The signs of the picketers read "C.P.U. on strike"; "Cut out your overtime and help us". Some eight people were engaged in these actions and most of the applicant's day shift who were scheduled to work (some 75 employees) refused to cross the picket lines. Norman White, an official of C.P.U. Local 343 and an employee of C.I.P. in Markham was on the picket line. He testified that he had been instructed by the President of his local, John Connors, to "mount a picket line" at the applicant's plant. On the evidence before us, we are satisfied that White told newspaper reporter, Michael Babad, that the action was taken because "Consolidated has been filling orders originally slated for C.I.P.". He told Babad that C.I.P. workers walked off their jobs to back contract demands for parity with employees of one of the other competing firms. He also warned that the picketing would be repeated on a sporadic basis, stating that "some day in the future, somebody will be along to shut them down for a day". Edward McLarnon, Operations Manager for the Whitby plant, was extensively cross-examined by union counsel. It is apparent that since the strikes at Domtar, C.I.P. and McMillan Bloedel, work at the Whitby plant has increased tremendously. Prior to the strike the plant was operating nowhere near capacity. Today, there is a substantial backlog of orders, production has increased greatly, overtime has increased greatly, and so has weekend work. However, McLarnon testified that the company does not have one new customer. He agreed that the increased work was due to the strike but explained that the applicant shared a number of customers with the struck employers and those customers appear to be directing their orders to the applicant now that the other companies are unable to fulfil their needs. John Gray, an employee at the Whitby plant and called by the company to give evidence, testified that he did not cross the picket line put up at that plant and that it was understood that "you don't cross your fellow brothers' picket lines". He testified that other employees indicated that they would prefer to wait until the company obtained an injunction forcing them to cross the picket line.

6. *St. Thomas*

A picket line appeared at the applicant's St. Thomas plant on August 6th and only half of a 50 employee shift reported for work. The rest of the employees honoured the picket line. Alan Stapleton, Plant Manager, testified that he recognized some of the picketers as C.I.P. employees from the London plant because he had worked previously at that plant as an industrial engineer. E.C.W.U. Local 29 represents employees at the C.I.P. location. Newspaper reporter, Douglas Bennett, testified that he spoke to a number of picketers and one was Peter Murphy, identified as Secretary-Treasurer of Local 29. He testified that Murphy told him that the picket line was to inform Consolidated-Bathurst workers that "they're running our orders". Murphy said his union wanted "common rates in the industry" and that C.I.P. workers are paid 22¢ to 26¢ less than what similar Consolidated-Bathurst workers are paid. He also stated that "if they won't run our work now, we won't run their work in December". Bennett testified that he called the E.C.W.U. London office and spoke to a Jim Rankin, identified as the union strike co-ordinator. He stated that Rankin told him that picketers were told "to cool it" and return to London in explaining why picketers were not at the St. Thomas plant when the afternoon shift reported to work. Rankin also indicated that C.I.P. workers could be expected to set up pickets at the Consolidated-Bathurst plant again the following week and, indeed, pickets reappeared on August 13th carrying both E.C.W.U. and C.P.U. picket signs. Pictures taken of the picketing were introduced into evidence and revealed at least one sign with the wording "Local 29, E.C.W. on strike". Others stated "C.P.U. on strike, let us fight the war now so you won't have to, don't run our work". Approximately twenty employees represented by the I.W.A. and scheduled to work honoured the picket line and did not report for work. Reporter David Dauphinee attended at the picket line and interviewed a person by the name of Rankin, who he believed to be on the union executive at the E.C.W.U. He testified that Rankin told him that C.I.P. strikers are upset that Consolidated-Bathurst employees are working overtime and on weekends to fill C.I.P. orders. He said he expected pickets will arrive the following week from other strike bound plants and that Consolidated-Bathurst employees could not expect support from strike bound unions at C.I.P. or McMillan Bloedel if they continue to accept overtime. He told Dauphinee that "all we want from them is a refusal to work overtime and a decision to work to rule, just work there 40 hours and nothing more".

7. Alan Stapleton was vigorously cross-examined and testified that work at the plant had increased substantially since the strike at the other companies. The applicant had moved to a three-shift operation; the backlog was very substantial; delivery dates were later; and there was more overtime and weekend work. However, he denied that the company had taken on new customers as opposed to an increase in business from existing customers who distributed their business, in the normal course of events, across the industry. He specifically denied telling Vern Warren, the I.W.A. local trade union president, that the plant was performing "struck work" and that Domtar, C.I.P. and McMillan Bloedel "Would bill their customers and if there was a difference between the Consolidated-Bathurst cost and their cost, the struck employers would pick up the difference". Rather, Stapleton testified, Warren put a question to him in the form of a hypothetical saying "If you were to run struck business, how would you do it?", and he replied that "We would bill that particular customer and they would take care of their customer". He specifically denied that the St. Thomas plant was performing struck work

in that the orders came from the customers and not the struck employers. Warren, however, testified that he asked Stapleton "With all this new work, . . . how does the billing go?". He said Stapleton replied "If we run work for Domtar, C.I.P. or McMillan Bloedel, they bill the customer and if there is a difference between our cost and their cost, they pay the difference". Stapleton's cross-examination did not reveal a general awareness of the billing procedures of the applicant. Billing is, apparently, centralized.

8. Warren testified that he is a member of the Inter-Union Corrugated Council (hereinafter referred to as "the Council"), a council of trade unions representing employees in the corrugated box industry. Membership of the Council also includes his own local, E.C.W.U. Locals 29 and 69; C.P.U. Locals 1199, 343, 1872, 595, 308, 1497, 309, 1150, 1196, 1597; and I.W.A. Locals 2337, 2-69, 2-242 and 2-76. He stated that John Connors, a union executive with C.P.U. Local 343, is a vice-president of the Council. One of the purposes of the Council is to formulate bargaining strategy with respect to the employers in the industry. The Council has recently recommended an increase in dues to assist employees on strike and Warren's own local has in fact increased dues recently. The Council meets from time to time throughout the year and, according to Warren, is part and parcel of union solidarity in the industry. He admitted there had been Council discussions with respect to the strike in the industry but he said he had not committed his members to honour picket lines.

9. *Etobicoke Plant*

Pickets appeared at the Etobicoke Plant on August 13th. C.P.U. Local 595 was identified on the signs and an official of that union, a Mr. Nugent, was on the line and spoke with company officials. He told them that the pickets were there because the company was running Domtar orders and we are satisfied that later remarks made by him indicated that the pickets are likely to reappear. Bernard Homes, Production Manager, acknowledged that the plant had experienced a considerable increase in work since the strike at Domtar, C.I.P. and McMillan Bloedel. He agreed that this was because customers could not get their boxes elsewhere but said that if the applicant refused the business it would be in danger of losing its share of the market after the strike. There was also the prospect of these customers taking their work to the United States. Many employees scheduled to work on August 13th refused to cross the picket lines. Lloyd Cox, one of these employees, testified that he did not cross picket lines as an act of "solidarity with his brothers". Robert O'Neil, General Manager for Ontario East, also testified to the increase in business at the Etobicoke and Whitby plants. It was his evidence, as it was the evidence of other company officials, that cutting and printing dies were the property of customers and that they were regularly transferred back and forth between companies in the industry. It was therefore standard practice for a die to come into a plant from Domtar or C.I.P. or McMillan Bloedel and have the competitor's seal taken off and the Consolidated-Bathurst seal or stamp placed on the die. A number of union witnesses testified about the arrival of new dies from the strike bound plants. O'Neil testified that he knew of no completely new customers and that he had no knowledge of what Domtar, C.I.P. or McMillan Bloedel had told their customers, if anything, with respect to the strike. He denied that Domtar or any one of the other struck employers billed their customers for any work now being done by the applicant. He stressed that the dies and orders were obtained from the customers through the applicant's sales representatives. He did not know whether the work would be retained

after the strike or not. The evidence appears to indicate that some customers are under contract because of annual bidding required by them but that much of the work in the industry is not undertaken under written or fixed contracts. Moreover, the very large customers such as Molson's, Labatt's, Canada Packers and others appear to distribute their work across the industry or at least place it with a number of large corrugated box manufacturers. Mr. Homes testified that on August 6th the union identified a new customer whose work was being performed and the company cancelled that order and returned the die to the customer on the basis of an assurance the company had given the union that it would not take on new customers.

10. *Hamilton Plant*

Four pickets appeared on August 13th and at least 25 employees scheduled to work honoured the picket line. The signs stated "C.P.U. on legal strike". Mr. Gills, Production Manager, testified that Mr. Oliverio, President of I.W.A. Local 269, told him that if pickets appeared he would not expect his membership to cross them. Mr. Gills agreed that there had been a substantial increase in work at the Hamilton plant and that it was probably because of the strike. Indeed, there had been a 400 percent increase in backlog together with the institution of a third shift, more overtime, and more weekend work. However, he emphasized that the customers owned the dies and that the Hamilton plant had not taken on new customers but rather experienced an increase in business from customers it shared with the struck companies. Mr. Oliverio testified and admitted that he had told the company that, for the protection of himself and his members, they would not cross any picket line in front of the plant. On August 13th he did not cross the picket line that was in place. He testified that he had inquired of the company whether it was going to "sign up the new customers" and was told by Mr. Gills "not at this time". Gills on the other hand confirmed other company evidence indicating that some accounts have contracts if tendered on a yearly basis but many do not.

11. Ron Eade, is a reporter with the Kitchener-Waterloo Record. He wrote an article dated August 4th, 1982 entitled "Union On Strike at Domtar Plans to Step Up Stoppages". He testified that the detail of this article was developed from information he received from Garry Buccella who he believed to be the union bargaining co-ordinator of the C.P.U. Buccella told him that "to put added pressure on the packaging industry, the Paperworkers Union plans to set up rotating information picket lines later this month at various packaging plants not involved in contract talks". He went on to say that "our position is that we are going to take everything and anything we can off the market" and "we are going to put information picket lines at every box plant we can get our hands on, and we're not kidding". He said work disruptions in Ontario and Quebec will escalate "as far and as deep as we can". These predictions, as the preceding evidence indicates, came true. Buccella was named as a respondent, notified of this application, but did not appear and give evidence.

12. Ronald Gruber, Manager of Labour Relations for the applicant's packaging group, was called by the union to testify. The following documents were placed before him and he was asked whether he attended a meeting of January 12, 1982 to which they appear to relate. He acknowledged that he did. They read:

Exhibit 32

January 12, 1982

PRIVATE & CONFIDENTIAL

RESTRICTED DISTRIBUTION

A meeting was held on January 12, 1982 to discuss Labour Relations within the Corrugated Industry. The following were in attendance:

Messrs. Shores
Roberts
Loggie
Gruber
Kirkland
Cox
Argue
Lamarche

The Chairman expressed the importance of the Confidential nature of the meeting and it was agreed that information discussed would be retained within the group of companies represented. In this regard, Mr. Holder of the C.P.U. has stated that he is aware of what takes place at management meetings because there is a leak of information.

1982 NEGOTIATIONS

- Consolidated Bathurst (C.B.) are scheduled to meet the C.P.U. in negotiations at St. John, N.B. on February 1, 2, and 3. (Contract expired on December 31, 1981). The Company experienced some problem in scheduling a meeting date with the Union and are taking the initiative to move along. C.B. have indicated they may apply for conciliation services with an officer available to assist on February 3rd. The Union have requested general increases that appear to be in line with Maritime Paper and ranging from 12 to 58% plus C.O.L.A. in the 1st year and 14% in the second year. They also have a "me too" clause with Domtar Moncton should the rates at the latter move to parity with Ontario and Quebec plants.
- Domtar have received formal notice from the C.P.U. that eleven of their locals from Winnipeg to Moncton have decided to pursue negotiations jointly. Company reps will meet a small representation from the union on January 25th to exchange views on the matter. The Company opposes joint bargaining other than the Ontario group of six plants.
- The contract at Domtar's Moncton operation terminates on March 31st and the company does not intend to allow negotiations to drag on.
- C.I.P. will negotiate with Ontario & Quebec operations jointly once again. The Company anticipate some pressure to include their St. John's Nfld. Plant even though

the contract there runs into April, 1983. It is also expected that the union will once again seek parity with McMillan Bloedel.

- Kruger met with Mr. Holder on January 11th. Holder took the opportunity to criticize the box industry and Domtar in particular. He warned Kruger to 'watch the C.P.U. strategy with Domtar.' (Not sure why he chose to vent his feelings at this meeting).
- Kruger anticipate joint bargaining with their Ontario/Quebec plants.
- McMillan and Bloedel are pretty well committed to joint bargaining with their Ontario/Quebec plants in 1982. M & B rates are the highest in the industry and they attempted in 1980 to reduce them without success. Their (M & B) indications are that Domtar will be the target Company.
- Abitibi-Price primary mill negotiations are scheduled to convene on March 15th in Quebec City.

General Comments

- If the primary mills accept the West Coast settlement, how will this affect the corrugated case or secondary industries?
- It appears that the C.P.U. have strong reason from a union viewpoint, to 'hold up' Domtar, i.e. Wage Rates, benefits, parity, joint bargaining. It was noted that Domtar has not agreed to joint bargaining in Ontario/Quebec.
- Union objective is for joint, industry wide bargaining.
- The 1980 C.P.U. objective (\$1.37 plus 90¢ to all sectors) was met.
- The box industry have applied the primary mill settlement since 1978.
- Union strategy will be to obtain the primary mill settlement in the Corrugated industry, plus parity with M & B.
- It would appear that the C.P.U. war chest is not too healthy due to payout made in the Domtar Fine Papers and West Coast strikes. Also costs have been high due to the raiding being carried on by the C.P.U.
- Consensus is that C.P.U. will obtain a settlement with C.I.P. or M & B and then go after Domtar for a similar settlement plus parity with M & B. However, during a recent meeting of the union council a Committee studying wages recommended that Domtar be the target to set the pattern and then impose parity with M & B. However, it would appear to be in the best interest of the union to settle with M & B or C.I.P. first.
- Apparently the I.W.A. have interest in a non-contributory Pension Plan.

Possible Consequences of Resisting Joint Bargaining

- Adverse effects on some primary mills if corrugator plants in same company refuse joint bargaining.
- Overtime bans, refusal to work, slowdowns.
- Lengthy strike.

Resist Primary Mill Settlement in Corrugated Containers

The following thoughts were tabled in discussing this subject.

- We should try to break away from primary mill settlement in spite of the fact that the Corrugated industry has followed it for 4 years and such is the strong objective of the C.P.U. (1970 demonstrates this well.)
- Create something different in wages (a split) and benefits.
- If the secondary industry doesn't make the break from the primary mill settlement in 1982, then forget it for the future; it will be cast in stone.
- Attempt to obtain a longer term agreement but probably impossible unless COLA is present.
- Due to current economics, we will require production improvements and a stop to bad practices in order to afford any kind of general increase.
- Attempt to retain a career earnings pension plan and any changes should only come about at contract negotiations time.
- Remove open ended provisions on insurance premiums.
- Resist banking of overtime.
- Resist the printing of safety legislation in the collective agreements.
- On the matter of Job Evaluation;
 - M & B have the Continental Plan out of steel.
 - C.I.P. have a commitment to follow the Continental Plan but have since told the union they would prefer to stay with a ranking plan. This is yet to be resolved.
 - Kruger have a commitment to go with the Corrugated Container evaluation plan.
 - Domtar have done nothing in this area.

General Consensus

That the Corrugated industry must develop cost comparison and other data to show why industry can't afford an increase along with the 'whys and wherefores'.

Determine the cohesiveness between the C.E.O.'s

Have C.E.O.'s pass message down, that the box industry business is serious and companies cannot absorb added cost.

It was agreed that a follow-up meeting of those present be held in February. This, of course, follows the C.P.U. Wage Conference scheduled for the week of January 18th, 1982.

Exhibit 33

TO E.R. Puddington
President
Domtar Packaging

DATE January 15, 1982

Copies/CC

PRIVATE & CONFIDENTIAL

J. B. O'Reilly
L. J. Roberts

From
G. W. Shore

Subject

As a result of the I.R. Meeting held on January 12, 1982 at Domtar Packaging office - Toronto, Minutes of the Meeting attached, I submit to you our thoughts and recommendations for the 1982 Corrugated Negotiations.

Of those major companies in attendance, the expiry date of their individual agreements are:

Domtar	- Ontario Plants	May 31, 1982
	- Quebec - Molson St.	May 31, 1982
	Duburger, Notre Dame	Dec. 31, 1982
	New Brunswick	March 31, 1982
C.I.P.	- Ontario	May 31, 1982
	Quebec	
Kruger	- Ontario	Sept. 16, 1982
	Quebec	May 16, 1982
M & B	- London, Guelph	June 16, 1982
	Rexdale, Montreal	August 15, 1982
Con. Bath	- St. John	December 31, 1982
	Ontario	December 31, 1982
	Quebec	
	Winnipeg	February 28, 1983

Atlantic	Ingersoll	October 15, 1982
	Scarborough	Feb. 1982
	Scarborough	Feb. 1983
(Did not attend)	Mississauga	Sept. 1983

OBSERVATIONS

Abitibi-Price will lead off in negotiations and it is expected they will complete negotiations with a settlement close to that (if not identical to) the West Coast, plus their Pension commitment.

The C.P.U. have, as a recorded objective in their Constitution, to 'bargain industry-wide' and seek to start this process through company-wide negotiations.

The C.P.U. have, as an objective, to bargain the same increase to all segments of the paper industry (Achieved in 1980).

The C.P.U. members in Ontario feel they should receive the West Coast Settlement, and in the case of Domtar, Parity with M & B.

We understand the C.P.U. is having some financial difficulties.

The C.P.U. expect that the Primary Mill Settlement will automatically be accepted by the Corrugated Industry. (We have accepted it for the last two rounds of negotiations).

The C.P.U. Objective in 1982 Negotiations:

- Bring Domtar up to a comparable rate as shown in our Competitor's agreements, namely M & B.
- Establish a common expiry date within companies in the short term and industry-wide negotiations in the long term.
- Take Domtar as the target company. Due to the Fine Papers strike of 1980-81 (the after effects on union membership makes good propaganda from a National officers point of view). A large Company in our business, but paying lower wages and insurance package than C.I.P. and M & B who are represented by the same union.
- Bring the West Coast Settlement into all segments of the industry.

DEMANDS

It is expected the Union's demand will in-part be:

(The following is a quote from the Minutes of the Inter Union Corrugated Council held in Toronto on October 24-25, 1981.

BENEFITS – Dan Dyson explained the following items committee recommends.

Weekly Indemnity – move to direct 70% no cap. 1 day hospital – 1 day sick

L.T.D. – move to 75% of base rate ... offset by CPP only ... equiv. to length of service or age 65.

Life Insurance – 2 times the base rate of earnings.

Dental Plan – equivalent to Blue Cross 7 with riders 1, 2, & 3 ... current fee schedule ... no max.

Vision Care – \$100 for eyeglasses (employees & dependents) every 24 months.

OHIP – current level for the fee schedule for OHIP ... contract language to cover any increases.

Vacations – 3 after 1 year service ... 4 after 7 years ... 5 after 15 years ... 6 after 20 years and 7 after 25 years service ... all week at 3% of gross earnings.

Supplementary Vacations – 5 years service 1 bonus week. 10 years 2 bonus weeks, 15 years 3 bonus weeks ... 20 years 4 bonus weeks and 25 years 5 bonus weeks ... to have privilege to carry from year to year.

Stat. Holidays – increase to 13 ... Heritage Day (Feb.) or floater at Christmas.

Maj. Medical – fully paid by Company (no co-insurance) prescription-card with 20¢ deductible.

Maternity Leave – same as Postal Workers

Meal Allowance – to improve by \$2.00.

Union Leave of Absence – Company to pick up cost of benefits. The Council accepted the Benefit Committee's report.

PENSIONS – Jim Campbell explained Committee compared different plans at different locations ... Final Earnings Formula (best 5 years \times years of service) 6% contributions. A lengthy discussion contributory or none was held.

Council adopted Pension Committee Reports.

WAGES – The Union Committee recommended all PARITY with Mc. Blo. ... Domtar set pattern after parity ... General increase to be decided at a later date.

Council accepted the Wage Committee report.

ASSUMPTION

C.P.U. Action Plan

Following an established pattern in the Primary Industry, the C.P.U. will:

1. Go after C.I.P., get the biggest package possible – Parity with M & B + increase.
2. Get the balance of the industry settled.
3. Go after Domtar with all other companies working to support the striking Domtar members and boycott all Production of Domtar.
(Same Scenario as Abitibi 1980).
4. Picket Red Rock – legally. They will hold back on Red Rock negotiations.

Harass Trenton – with illegal pickets.

The Corrugated Industry's Objective in 1982 Negotiations.

To ensure the Corrugated Industry does not get drawn into the Primary Mill Settlement.

Establish amongst the Industry representatives, a common commitment for a 1982 approach at the bargaining table at least equal the cohesive approach (by the various locals) as orchestrated by the C.P.U. Headquarters.

Company's Action Plans

Launch into an intensive communications program explaining the financial position of the industry and companies. This program initiated by the Chief Operating Officer of the representative Companies Corrugated Group.

Note:

It is Management's responsibility to ensure the financial position of the Company is directed to our employees and not just the Union Executive.

Management to jointly divide the objective re the amount of our 1982 General Increase.

I.R. Personnel will then outline the Negotiating Strategy to meet Company Goals. (Refer to Comments in Minutes.)

13. We were advised that Mr. Shore is from Domtar; Mr. Roberts is from Domtar; Mr. Loggie and Mr. Gruber are from Consolidated-Bathurst; Mr. Kirkland is with Kruger; Mr. Cox is also with Kruger; Mr. Argue is with McMillan Bloedel; and Mr. Lamarche is with C.I.P. Mr. Gruber testified that Domtar called the meeting held at Domtar's packaging headquarters on January 12th, 1982; that the "minutes" were produced by Domtar officials; and did not accurately reflect what he took away from the meeting. He pointed out that Domtar had prepared both documents and only reflected the author's understanding. Gruber understood the meeting as an informational one to discuss labour relations in the corrugated box industry. It was not part of a regularly held event. He admitted that there was an industry concern about following the primary mill settlement as the industry had for the last two settlements and he also agreed that the applicant was very interested in the upcoming Domtar negotiations in that the applicant had followed that pattern in the last two sets of negotiations. He denied that there was any intention formed on the part of the attending companies to follow a common strategy. He said the purpose of the meeting was to keep the chief executive officers informed of developments in the industry. While a follow-up meeting in February was planned as indicated in Exhibit 32 no such meeting was held. Gruber said that this was probably because the minutes of the first meeting were "leaked". He pointed out that this was not the only opportunity for labour relations people in the industry to get together. There is a Canadian Corrugated Case Association and many of these companies belong to the Industrial Relations Section which meets from time to time during the course of a year. He said the industry was very competitive and that there was no discussion at the meeting about what various companies would do in the event of a strike. He also admitted that many of the same people who attended the January 12th meeting attended a very recent meeting at the Airport Hilton in Toronto. He said that this meeting was also strictly informational. He denied that there was a common understanding on the part of the employers in the industry to not get drawn into the primary mill settlement in 1982 and further denied any agreement on a common bargaining strategy. He pointed out that his company was not involved in negotiations at this time and that when it did become involved its objective would be to get "the best deal at the lowest cost".

14. The principal provisions of the Act relevant to the submissions of the parties are sections 74, 76 and 92. They provide:

74. No trade union or council of trade unions shall call or authorize or threaten to call or authorize an unlawful strike and no officer, official or agent of a trade union or council of trade unions shall counsel, procure, support or encourage an unlawful strike or threaten an unlawful strike.

76.-(1) No person shall do any act if he knows or ought to know that, a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike or an unlawful lock-out.

(2) Subsection (1) does not apply to any act done in connection with a lawful strike or lawful lock-out.

92. Where, on the complaint of a trade union, council of trade unions, employer or employers' organization, the Board is satisfied that a trade union or council of trade unions called or authorized or threatened to call or authorize an unlawful strike or that an officer, official or agent of a trade union or council of trade unions counselled or procured or supported or encouraged an unlawful strike or threatened to engage in an unlawful strike or that employees engaged in or threatened to engage in an unlawful strike, the Board may so declare and, in addition, in its discretion, it may direct what action if any a person, employee, employer, employers' organization, trade union or council of trade unions and their officers, officials or agents shall do or refrain from doing with respect to the unlawful strike or the threat of an unlawful strike.

15. On behalf of the respondents it was submitted that section 74 had not been violated in that neither the C.P.U. nor the E.C.W.U. could call or authorize or threaten to call or authorize an unlawful strike of members belonging to the I.W.A. It was argued that only the I.W.A. could call or authorize or threaten to call or authorize an unlawful strike of those employees. It was further submitted that the remaining portion of section 74 dealing with officers, officials or agents of a trade union had to be read in the context of that provision and interpreted to mean officers, officials or agents of a trade union that could "call or authorize" an unlawful strike, i.e. in this case the I.W.A. The respondents pointed out that the wording of section 92, particularly that portion dealing with the Board's remedial power, buttressed their contention that section 74 dealt only with trade unions and officials who could call or authorize an unlawful strike. Alternatively, it was submitted by counsel for E.C.W.U. that the applicant had failed to name any officer, official or agent of E.C.W.U. and that the entire application had to be dismissed as against the two E.C.W.U. locals because section 76 did not refer to trade unions either. It was further submitted that this Board lacked jurisdiction to regulate picketing under either section 74 or 76 in that the courts had exclusive responsibility in this respect as evidenced by section 20 of *The Judicature Act*. It was contended that if section 76 dealt with picketing at all, subsection 2 indicated that it was intended to deal only with picketing by persons unconnected with a lawful strike. In the facts at hand, all counsel submitted that the picketers were associated with lawful strikes being conducted against Domtar, C.I.P. and McMillan Bloedel.

16. In the alternative, the respondents submitted that the applicant had clearly allied itself with the struck employers by performing work that would otherwise have been performed at the struck plants, i.e. referred to as "struck work". Counsel stressed that the applicant had a real interest in the negotiations in that it had followed the pattern of such negotiations over the last two rounds of bargaining and the evidence clearly indicated that the employers had met as a group on January 12th, 1982 and as late as August 1982. It was argued that the employers clearly had a common bargaining strategy and that part of the strategy included the performance of struck work for struck employers for the duration of any strike. On the basis of this submission it was contended that the Board ought to exercise its discretion under section 92 and refrain from issuing any direction. The Board was provided with exhaustive case and periodical references including *Douds v. Metropolitan Federation of Architects (Ebasco)* (1948),

75 F. Supp. 672; *N.L.R.B. v. Business Machine (Royal Typewriter Co.)* (1955, 228 F. (2d) 553; *Ingram Barge Company* (1962), 136 N.L.R.B. 1175; *D.M. Picton & Co., Inc.*, 131 N.L.R.B. 693; *Labourers International Local 859 v. N.L.R.B.*, 446 F. (2d) 1319; *Haul-Away Disposal Ltd.*, (1975) 2 C.L.R.B. 97; *Liquor Distribution Branch (Hiram Walker)*, [1978] 2 C.L.R.B. 334; *Alex Henry & Sons Ltd. v. Gale, et al* (1976), 14 O.R. (2d) 311; and Levin, "Wholly Unconcerned": *The Scope and Meaning of the Ally Doctrine Under Section 8(b)(4) of the NLRA* (1970), 119 U of Penn. L.Rev. 283.

17. On behalf of the applicant it was submitted that Mr. Buccella was an officer, official or agent of the various trade unions. Counsel contended that even if the applicant had neglected to name specific officers, officials or agents of E.C.W.U. locals, the locals had been given adequate notice and the evidence clearly supported the unlawful involvement of Peter Murphy and Jim Rankin. Alternatively, counsel relied on section 104 of the *Labour Relations Act* in submitting that it was open for the Board to order the proper person to be substituted or added as a party where it is satisfied that a bona fide mistake has been made with the result that the proper person has not been named as a party. The applicant's counsel submitted that the Board and the courts had concurrent jurisdiction to regulate picketing as evidenced by the Board's recent decision of *Sarnia Construction Association et al*, (*supra*). Counsel urged that in the circumstances at hand the Board was the preferable forum in that the Board's proceedings allowed for a complete investigation of the labour relations facts and the related concerns of the respondents that the employers in the industry were conspiring against them. Counsel contended that section 92 was a very broad remedial section that allowed the Board to fashion an industrial relations remedy in a way that the courts may be unable to do. It was submitted that violations of section 74 and 76 had clearly been made out and that the applicant was a competitor to the struck employers and a neutral servicing third party customers.

18. On the evidence before us, there can be no dispute that unlawful strikes have occurred at all four plants. Employees of the applicant are subject to collective agreements obligating them to work as scheduled and on the evidence before us we are satisfied that the honouring of the picket lines at all four locations constituted a cessation of work, a refusal to work or to continue to work in combination or in accordance with the common understanding. See *International Longshoremen's Association, Local 273 et al v. Maritime Employers Association et al* (1978), 78 CLLC ¶14,171 at 217. We are further satisfied that the picket lines caused these unlawful strikes. The evidence also indicates the likelihood of such pickets reappearing. The applicant has chosen to go against the pickets and not its own employees on the theory that it is more appropriate to eliminate the source of the problem than to aggravate the personal conflict experienced by employees forced to choose between their legal obligations under a collective agreement and their commitment to the labour movement. Counsel for the applicant submitted that it was unfair to limit it to remedies, before this Board and under its collective agreement, against its own employees when it was the picketers who had created the problem in the first place.

19. Contrary to the submissions of the respondents' counsel, there can be little doubt of this Board's jurisdiction to regulate picketing causing unlawful strikes. The substantive basis for this regulation is longstanding. The *Labour Relations Act*, 1960; Laskin, *The Labour Relations Amendment Act 1960* (1961-62), 14 *Labour Law-*

Secondary Picketing – Per Se Illegality – Public Policy (1963), 41 Can.Bar Rev. 573 at 584. The equally important remedial jurisdiction is, however, more recent. See *The Labour Relations Amendment Act, 1970* (No. 2), S.O. 1970, c. 85, s. 41; and *The Labour Relations Amendment Act, 1975*, S.O. 1975, c. 76, s. 22 (this amends s. 82, now s. 92). We do not accept the interpretation of section 74 that limits its application to the actions of agents and officials of trade unions directed at employees represented by such trade unions. The section does not make this limitation explicit nor, in our opinion, does section 92. The substantive reference in section 92 repeats the wording of section 74. Only the remedial portion differs and it differs in a number of respects by referring to persons, employers, employees, and employers' organizations in addition to trade unions, council of trade unions and *their* officials. This latter reference to "their officers, officials or agents" is in our view simply a generic or economical reference linking unions and officials and avoiding additional verbiage. It has, in our opinion, no substantive significance. Moreover, a large and liberal interpretation should be given to these obvious remedial provisions to support industrial relations stability. See *Tandy Electronics Ltd. (Radio Shack) v. United Steelworkers of America and OLRB*, 80 CLLC ¶14,017. Early examples of the exercise of our cease and desist powers in relation to organizational picketing and other forms of picketing generating mid-term unlawful conflict include *Wheelabrator Corporation of Canada Limited*, [1974] OLRB Rep. July 490; *Beatty-Hall Construction Co. Ltd.*, [1973] OLRB Rep. May 271; *D.R. Crawford Construction Ltd.*, [1973] OLRB Rep. May 259; and *North Queen Transport Limited*, [1975] OLRB Rep. 880.

20. Section 74 only refers to a trade union in the context of the prohibition against the calling or authorizing or threatening to call or authorize an unlawful strike. None of the trade unions named in this application could call or authorize an unlawful strike of the applicant's employees within the meaning of that section in our view. None of the trade unions represented such employees and the establishment of picket lines, while provoking or causing an unlawful strike, cannot be characterized as an act of calling or authorizing. To this extent we agree with the respondents that calling or authorizing an unlawful strike suggests that the trade union in question has authority over the employees who are engaging in an unlawful strike. The C.P.U. and the E.C.W.U. have no such authority. Similarly, section 76 cannot be breached by a trade union in that it directs that "no person shall" and, in the context of this legislation, the term "person" is not a reference to a trade union. The only official or person named by the applicant is Mr. Garry Buccella.

21. Mr. Buccella did not testify but Mr. Eade, a newspaper reporter, stated that he spoke with him and described him as the union bargaining co-ordinator for the C.P.U. We are therefore satisfied that Buccella is an officer, official or agent for all of the C.P.U. unions without evidence to the contrary. Indeed, in his conversation with Mr. Eade he held himself out as being able to co-ordinate picketing throughout Ontario. He told Mr. Eade that "the Paperworkers Union" was planning to set up rotating information picket lines later in the month at various packaging plants not involved in contract talks. That is exactly what happened. He further indicated that it was the Paperworkers Union position "to take everything and anything we can off the market". He further indicated that "we are going to put information picket lines at every box plant we can get our hands on and we are not kidding". Without evidence from any of the named trade unions to the contrary, we are satisfied that the picketing in question was co-

ordinated by Mr. Buccella and that it can therefore be said that he thereby counselled, procured, supported or encouraged unlawful strikes at the four plant locations in question. We are further satisfied that his conduct can be construed as authorizing picket lines which he knew or ought to have known that, as a probable and reasonable consequence of their placement, the employees of the applicant would engage in an unlawful strike. Because of the existence of the Inter-Union Council and obvious co-ordination of C.P.U. and E.C.W.U. members, this finding against Mr. Buccella also pertains to the E.C.W.U. picket lines. We note that a vice-president of the council is an official of the C.P.U. i.e. Mr. Connors. This then brings us to the issue of whether Mr. Buccella can raise section 76(2) of the Act as a defense.

22. Section 74 and 92 must be interpreted in the context of the other provisions of the statute and of industrial relations practices. Similarly, the Board's discretion under section 92 must be exercised in the light of these same considerations. It is from this perspective that the Board has said that section 74 must be read and applied with due regard to the legislation policy expressed in section 76. See *Canteen of Canada Limited*, [1978] OLRB Rep. Mar. 207. Picketing is a traditional method employed by workers to publicize their employment disputes and to attract support. If section 74 was applied literally by this Board, picketing at their workplace by employees lawfully on strike would be restrained if honoured by other employees of the struck employer or by the employees of suppliers providing goods and services to the struck location. Section 76(1) is aimed more broadly and directly at picketing in that it applies to "persons" as opposed to trade union officials and requires only the finding that persons will engage in an unlawful strike as the probable and reasonable consequence of the picketing and not that an unlawful strike has occurred. However, by section 76(2) the Legislature has made it clear that it does not intend to restrain picketing done "in connection with a lawful strike". In other words, accommodation is made for the traditional exercise of picketing conduct. This Board has therefore read section 74 in light of section 76(2) and declined to restrain, under either section 92 or 135, the involvement of union officials in picketing properly associated with a lawful strike. This case, like *Sarnia Construction Association*, raises the issue of the scope of picketing envisaged and permitted under the Act. Is this picketing in connection with a lawful strike within the meaning of the Act?

23. Ontario has not chosen to provide a detailed code for picketing such as exists in the Province of British Columbia. Rather, more like the *National Labor Relations Act*, the Act begins with the premise that all actions causing unlawful strikes are themselves unlawful and then a very general exemption is provided for "any act done in connection with a lawful strike" to accommodate labour's traditional exercise of picketing activity. Prior to the enactment of section 20 of the *Judicature Act* and the Board's cease and desist remedial jurisdiction, section 76(2) was largely irrelevant. Ex parte, interim and final injunctive relief was available in the courts in actions brought against picketers and framed in common law terms. Section 76(2) simply was a defense to a prosecution under the Act but was not seen as founding a positive statutory right. However, the courts did try to rationalize common law tort and contract laws with lawful strike action and important accommodations were made for picketing arising out of an otherwise lawful strike and confined to the primary work location. See *Tenen Investments Ltd. v. Wueller* (1966), 66 CLLC ¶14,151; *Lescar Construction Co. Ltd. v. Wigman*, [1969] 20 O.R. 846; *Refrigeration Supplies Co. Ltd. v. Ellis et al* (1970), 14 D.L.R. (3d) 682; *Falconbridge Nickel Mines Ltd. v. Tye, Boundreau, et al* (1971), 71

CLLC ¶14,101. Secondary picketing – the picketing of an innocent third party to a labour dispute – was clearly unlawful both at common law and under the *Labour Relations Act*. See *Hersees of Woodstock Ltd. v. Goldstein et al*, [1963] 2 O.R. 81.

24. However, the situation in the courts with respect to labour relations conflict was significantly affected by the passage of section 20 of the *Judicature Act*. This enactment sets down stringent rules for the availability of injunctive relief in a labour dispute. “Labour dispute” is defined very broadly and, in such a dispute, an injunction is only available if the court is satisfied “that reasonable efforts to obtain police assistance, protection and action to prevent or remove any alleged danger of damage to property, injury to persons, obstruction of or interference with lawful entry upon or exit from the premises in question or breach of the peace have been unsuccessful”. See the *Judicature Act* R.S.O. 1980, C. 223 as amended s. 20(e). The history behind this section bears some resemblance to the forces in the United States giving rise to the *Clayton Act of 1914* and the *Norris-LaGuardia Act of 1932*. However, Ontario courts have had to interpret the meaning of “labour dispute” to determine the application of section 20 and have held that picketing directed at neutral third parties or at employers not connected with a labour dispute falls outside the section and is amenable to injunctive relief. But in so holding, the courts have tried to ensure that an applicant has not involved himself in a labour dispute. See *Commonwealth Holiday Inns of Canada v. Sunday et al*, [1974] 2 O.R. (2d) 601; *Alex Henry & Son Ltd. v. Gale et al*, [1976] 14 O.R. (2d) 311; and, generally, Beatty, *Secondary Boycotts: A Functional Analysis* (1974), 52 Can. Bar Rev. 388.

25. At the very time the courts were being restrained in their involvement in labour disputes, this Board was being given more extensive remedial powers to control and regulate all forms of industrial relations conflict. Indeed, this jurisdiction was recognized by the court with respect to picketing. See *Nadrofsky Steel Erecting Ltd. v. Doyle* [1973] 30 R. 515, 37 D.L.R. (3d) 343. In the case of picketing, general substantive guidelines were already in place and this new remedial jurisdiction therefore provided the labour relations community with an alternative forum to the courts. The Board’s substantive mandate clearly differs from that of the courts and it cannot be said the two jurisdictions are congruent. For example, see the outcome of *Sarnia Construction Association, supra*. However, cases decided under section 20 of the *Judicature Act* involve a somewhat similar balance of competing factors and can provide useful guides in particular cases. This Board is obligated to determine whether “the act done” (i.e. picketing) is “in connection with a lawful strike”. One interpretation might be that as long as the picketers are on lawful strike somewhere in Ontario they can picket anyone and anywhere else without restriction by this Board. We do not, however, believe that the Legislature intended to insulate picketing to this extreme extent. Rather, the emphasis of section 76(1) is on affording positive protection against picketing. Reading subsection (1) and (2) together, we believe the Legislature intended to protect innocent third parties from the effects of labour disputes while, at the same time, accommodating the traditional actions of employees involved in lawful strike action, i.e. picketing. To use the classic jargon of this area of labour relations, the Legislature has attempted to maintain a balance between the rights of unions to engage in primary activity and the rights of secondary employers to remain free from the direct involvement in the disputes of others. A similar balance arises out of the secondary boycott provisions of the *National Labor Relations Act* in the United States wherein section 8(b)(4)(B) prohibits

secondary boycotts, as Senator Taft put it, "to injure the businesses of a third person who is wholly unconcerned in the disagreement between an employer and his employees." See 93 Cong. Rec. 4198 (1947); *Levin, supra*, page 285. It has been for the NLRB to determine whether any particular employer, complaining of unlawful secondary boycott activity, is in fact wholly unconcerned. Exercising a somewhat analogous function, this Board is required to determine whether particular actions complained of are done in connection with a lawful strike understanding that s. 76(2) does not sanction action directed at a person or employer wholly unconcerned in a disagreement between another employer and his employees. Picketing directed at a neutral third party is not in connection with a lawful strike occurring between other parties within the meaning of the subsection. Such actions may, depending on the circumstances, violate both sections 76(1) and 74 and can be remedied under sections 89 and 92.

26. Thus, in *Sarnia Construction Association, supra*, the Board found that picketing at construction sites by a striking trade union when the work of the trade was not being performed could only have the purpose of being aimed at employers and employees unconnected with the dispute except by geographical proximity. Accordingly, from this viewpoint, the Board ruled that the picketing was not in connection with a lawful strike and instructed that gates be erected for the employees of these neutral employers. The striking trade was prohibited from picketing these gates as long as their work was not being performed.

27. In this case we must also determine whether the applicant is truly a neutral party. In the United States "the ally doctrine" was developed under section 8(b)(4)(B) to characterize third parties who had involved themselves in a labour dispute of others and who were therefore not entitled to the protection of the secondary boycott provision. For example, if a struck employer hires strike breakers, these persons can clearly and properly be subjected to picketing. If the struck employer instead contracts out his struck work to another employer at premises remote from the dispute, to preclude the striking employees from picketing at the new location where the work is being performed would render the strike right illusory. Moreover, the secondary employer who receives the struck work is obviously not an innocent bystander for whom either 8(b)(4)(B) of the *National Labor Relations Act* or s. 76(1) and S.74 of the *Labour Relations Act* were designed. Such a secondary employer is therefore to be viewed as standing in the shoes of the primary employer and is a proper target for picketing. Reference to this doctrine was made at paragraph 10 of the *Sarnia Construction Association* decision and it is the application of this doctrine that is in issue in the facts at hand. A review of a number of cases relied on by the respondents provides a useful prelude to the characterization of the applicant as either a neutral or an ally.

28. In *Douds v. Metropolitan Rederation of Architects (Ebasco)*, 75 F. Supp. 672 (S.D.N.Y. 1948) striking Ebasco employees picketed Project Engineering, an independent partnership, which had done an appreciable percentage of its business with Ebasco prior to the strike under a cost-plus contract giving Ebasco the power to supervise the work done by Project's employees and set ceilings on their wages. After the strike began, Project performed a significantly greater amount of work for Ebasco, some of which was transferred to Project in the half-finished state in which the strikers left it. In refusing the the injunction to Project, Judge Rifkend noted that the effect of Project's

activities on the strike was exactly the same as though Ebasco had hired strike-breakers and concluded that section 8(b)(4)(B) did not protect the business of indirect strike-breaking. In words now classic the court wrote (at page 676-77):

To suggest that Project had no interest in the dispute between Ebasco and its employees is to look at the form and remain blind to substance. In every meaningful sense [Project] had made itself party to the contest. Manifestly it was not an innocent bystander nor a neutral. It was firmly allied to Ebasco and it was its conduct as ally of Ebasco which directly provoked the union's action.

29. The performance of struck work was also the subject matter of another major case in *NLRB v. Business Machine Mechanics Local 459 (Royal Typewriter Co.)*, 228 F.2d 553 (2d Cir.1955), cert. denied, 351 U.S. 962 (1956). Struck by its repairmen, Royal instructed customers to whom it owed repair obligations to have their typewriters fixed by any independent repair company, pay for the repairs, and send the receipts to Royal for reimbursement. Most of those customers sent Royal their unpaid bills which Royal then paid. Apart from these payments, Royal had no contract with the independents. When striking Royal employees picketed the independents, the court overturned the Board and found that section 8(b)(4)(B) had not been violated. The Court concluded (at page 559):

An employer is not within the protection of section 8(b)(4)(B) when he knowingly does work which would otherwise be done by striking employees of the primary employer and when the work is paid for by the primary employer pursuant to an arrangement devised and originated by him to enable him to meet his contractual obligations. The result must be the same whether or not the primary employer makes any direct arrangement with the employers providing services.

The doctrine therefore presents a powerful deterrent to attempts by primary employers to circumvent the effects of a strike and the secondary employer can escape the pressure by simply refusing the struck work. Variations on this theme distinguish the supplier or secondary employer who has dealt with the primary employer prior to the strike and continues this business relationship after the strike's commencement. In such circumstances, the relationship, provided it remains unaltered, is not a reaction to the strike and the secondary employer is therefore not a proper target of picketing in that the work he is performing would not have been performed by the striking employees but for the strike. See *McLeod v. Local 365, U.A.W., (Intertype Co.)* 200 F.Supp. 778 (E.D.N.Y. 1962). See also *Ford Motor Co. of Canada Ltd. v. Browning* (1978), 86 D.L.R. (3d) 579.

30. Secondary employers and customers are entitled to extricate themselves from the consequences of the labour disputes of their suppliers. These self help cases are illustrated by the leading case, *Longshoremen's Local 333 (New York Shipping Association)* (1954), 107 NLRB 686. In that case employees of harbour tugboat operators struck forcing the tugs to suspend operations. The pier operators, who normally relied on the

tugs, used their own employees to pull the ships hand over hand. Although technically struck work, an injunction was refused because it was not done for the primary employer and did not enure to their benefit. The Trial Examiner noted (at page 708):

[Secondary] employers by seeking to accommodate their operations to the strike situation [do not necessarily make] – themselves allies in interest with struck employers.... A secondary employer faced with a strike against his supplier of services is not obliged to sit idly by lest he forfeit his status as a natural; he may, without risking the protection section 8(b)(4)(B) accords him ..., seek other suppliers, devise other methods, employ other means to enable him to continue his business or as nearly normal a level as possible.

31. A striking similarity to the facts before us are those in *Local 333, NMU (D.M. Picton) (1961)*, 131 NLRB 693. Picton and Sabine were the only commercial towing companies in the relevant geographic market and local secondary employers customarily rotated their business between the two. When Sabine's employees struck, Sabine shut down and sent an open letter to its customers advising that Picton would be available during the strike. Picton declared it would not handle any of Sabine's work during the strike and refused to tow any vessel owned by or under contract to Sabine. Nevertheless, its business increased greatly because the market it had shared had become a temporary monopoly. When the employees of Sabine picketed every second boat towed an injunction was granted. *Levin, supra*, in analyzing the case, makes the following points at pages 308 and 309:

Because Sabine and its customers knew that, given the market structure, Picton had to do Sabine's normal work and that Sabine would return the favor if Picton were struck, any shutdown by Sabine automatically created "an arrangement." In this sense Sabine's letter and Picton's disclaimer were irrelevant because the transfer would have occurred even in their absence. On the other hand, unlike the situation in *Ingram Barge*, the secondaries dependent on Sabine for towing had no alternative but to switch to Picton, and to hold that Picton was the primary's ally by the de facto arrangement resulting from this fortuitous market structure would deprive the customers of their only significant opportunity for self-help. Moreover, in one sense at least, no arrangement existed: Picton worked not for Sabine but for Sabine's customers. The services were rendered in Picton's name, not Sabine's, and even if Picton's towing reduced the economic impact of the strike on the customers, Sabine did not benefit in any economic sense as long as it remained closed.

Although the last arguments may also be advanced in defense of "back-scratching" arrangements by which parties agree to take up the slack caused by a strike against either, it is at this point of deadlock between the right to strike and the right to secondary self-help – only at this point – that good faith enters the picture. By refusing to handle all the work Sabine was contractually obligated to

perform, Picton did all that could reasonably be asked of a secondary desiring to remain neutral consonant with the right of Sabine's customers not to have to shut down all operations dependent on towing. The primary employees' right to exert full economic pressure on their employer is largely preserved when the challenged secondary's actions exhibit a bona fide intent not to interfere in the dispute, and that right should give way at its edges when the failure to do so will cause avoidable and disproportionate harm to secondary customers not directly involved. The Board in effect so held in Picton.

32. Accordingly, a customer or secondary employer may attempt to reduce the impact of the strike on his business as long as it does not reduce the impact of the strike on the primary employer by enabling him to continue his business. No alliance will usually exist where the impetus for substitution comes solely from customers of the struck primary employer and the services are not undertaken for the primary employer's account or in his name. However, we should point out that where the primary employer has been performing work at the customer's site prior to the strike, attempts to alter the status of picketing by terminating the relationship with the primary employer may raise different considerations. See Levin, *supra*, pages 309-313; *Lescar Construction Co. Ltd.*, *supra*; *Refrigeration Supplies Co. Ltd.*, *supra*; and *Falconbridge Nickel Mines Ltd.*, *supra*. But abstract pronouncements are not appropriate and the Board should be reluctant to develop *per se* rules in this area. Each case must be analyzed in light of the established facts, the industrial relations realities, and competing policy considerations.

33. Against this analysis we cannot find that the facts established before us justify the finding that the applicant is an ally or has allied itself to the struck employers. It is important to note that the dies in question are the property of the customers and that customers would have a keen interest in having their work performed by other non-struck corrugated box manufacturers. The applicant is a natural manufacturer for the customers to have recourse to in that the applicant was already performing work for such customers. There is no evidence that the customers are being directed to the applicant by the struck employers or that there is any kind of arrangement by which the struck employers will compensate the customers for any increased cost in having their work performed elsewhere. The applicant has also spurned completely new business. While there is some evidence to indicate that the customers may well return a portion of their patronage to the struck employers at the conclusion of the strike there is no clear understanding that this will be the case and we are satisfied that the applicant is interested in retaining this work if this is at all possible. The applicant also has bona fides concerns over customer reaction if it were to turn its large clients away in their time of need. We have been troubled by the joint meetings of the employers, including the applicant, in January and subsequently in August of this year. Employee suspicions of an arrangement are somewhat understandable in the context of these meetings. The applicant also has a real interest in the outcome of the negotiations involving the struck employers in that this settlement has been a pattern settlement in previous rounds. But a thorough review of the "minutes" produced does not disclose an understanding that the applicant perform struck work and that the meetings were anything more than informational in purpose. It must be remembered that the unions take an industry approach to their bargaining and it is natural for employers who are affected by their industry-wide

efforts to exchange information, concerns and views. On the evidence before us we cannot find that the applicant has gone beyond this purpose or that it is acting in a manner other than as a true competitor to the struck employers in performing work that is clearly arising from the unavailability of the struck employers to perform work for their customers. The situation, in our opinion, is more analogous to the *New York Shipping* and *D.M. Picton* cases reviewed above. Accordingly, we find that the applicant is a neutral and that the picketing directed at it is not in connection with a lawful strike within the meaning of section 76(2). The picketing co-ordinated by Mr. Buccella therefore violates sections 74 and 76(1) and we are unwilling to exercise our discretion under either section 92 or 89.

34. Having regard to all of the foregoing, the Board makes the following findings and order:

1. The application, as against all respondent trade unions, is dismissed.
2. The Board, having found that the respondent Garry Buccella counselled, procured, supported or encouraged unlawful strikes at the premises of the applicant, and that he knew or ought to have known that as a probable and reasonable consequence of authorizing picket lines at those premises, employees of the applicant would engage in an unlawful strike, hereby so declares that Garry Buccella has contravened sections 74 and 76(1) of the Act.
3. The Board hereby directs Garry Buccella, and any other person having notice or knowledge of this order and decision, to forthwith cease and desist from
 - i) counselling, procuring, supporting or encouraging an unlawful strike or employees of Consolidated-Bathurst Packaging Limited;
 - ii) authorizing, establishing, or maintaining a picket line or picketing;
 - iii) doing any other act which they know, or ought to know, as a probable and reasonable consequence of such act, employees of Consolidated-Bathurst Packaging Limited will engage in an unlawful strike

at the premises of Consolidated-Bathurst Packaging Limited at the following locations:

- (a) P.O. Box 140,
Water Street,
Whitby, Ontario;
- (b) 730 Islington Avenue,
Etobicoke, Ontario;

(c) Cavell Avenue,
Hamilton, Ontario; and

(d) 1155 Talbot Street,
St. Thomas, Ontario.

DECISION OF BOARD MEMBER F. S. COOKE;

1. I find that I am unable to join in the decision of my colleagues in this case. I must respectfully disagree with their conclusions as my view of the evidence we received and my interpretation of the *Labour Relations Act* differs from theirs.

2. My first point of disagreement is with the finding of the majority at paragraph 18 that “unlawful strikes have occurred”. In coming to this conclusion, the majority relied upon the Supreme Court of Canada decision in *International Longshoremen’s Association, Local 273 et al. v. Maritime Employers Association et al* 78 CLC ¶14,171, which was concerned with a matter under the *Canada Labour Code*. The definition of the term “strike” in the *Canada Labour Code*, which was interpreted by the Court in that case, is different from the definition of that term in the *Labour Relations Act* of Ontario. Specifically, the final clause in section 1(1) (o) of the Act, “designed to restrict or limit output”, is conspicuously absent from the definition of strike in the *Canada Labour Code*.

3. There was no evidence before this Board establishing that the cessation or refusal to work by the applicant’s employees was “designed to restrict or limit output”. The final qualification in section 1(1)(o) must be read in relation to the entire definition of strike. A slowdown by employees will limit or restrict output, as will a total cessation of work. In my opinion, concerted activity which is not designed to have an adverse impact upon an employer’s operations, but which, as a consequence of that activity, results in a work stoppage is not a strike. In other words *any* activity must be “designed to restrict or limit output” before it can constitute a strike. Since the Supreme Court of Canada did not have to deal with this clause in determining whether the honouring of picket line was a strike, the Court’s decision does not require that this Board find that employees who respect a picket line established by other trade union members are engaging in a strike. As counsel for the applicant argued, and the evidence before us showed, in this case the activity of the applicant’s employees was simply an expression of solidarity with fellow members of the labour movement without any intention to adversely affect the operations of the applicant. To the extent my interpretation of the term strike differs from the decision of the Board in *Domglas Ltd.*, [1976] OLRB Rep. Oct. 569, I disagree with it and would not follow it

4. There was no evidence before this Board to establish that the refusals to work took place “in combination or in concert or in accordance with a common understanding.” Admittedly, the decision of the Court in *Maritime Employers Association* appears to eliminate the need for such evidence but this would have been a good opportunity for this Board to distinguish this case and adopt a different approach. Surely the legislature

meant more than merely a shared political perspective when it imported the requirement of a "common understanding" into the definition of a strike. For this Board to accept the reasoning in the decision in *Maritime Employers Association* on this issue is an example of statutory interpretation which unnecessarily creates further impediments to the labour movement's ability to engage in meaningful expressions of support for its members.

5. In any case, in light of the difference in the definition of "strike" between the *Canada Labour Code* and the Ontario Act, I would have held, notwithstanding the *Maritime Employers Association* case that the applicant did not establish that unlawful strikes have occurred. On this ground alone I would have dismissed the application.

6. I find that I also disagree with the majority's interpretation of sections 74 and 76. The Board earlier and the majority in this case was somewhat troubled in interpreting sections 74 and 76 because of the apparent anomaly that the defence available in section 76(2) is only applicable, by the express words of section 76(2) itself, to an alleged breach of section 76(1). (See e.g. *Canteen of Canada Ltd.*, [1978] OLRB Rep. Mar. 207, at ¶17ff, and the decision of the majority in this case, at ¶22). This problem has been resolved by declaring that section 76(2) is *also* applicable to alleged breaches of section 74 *despite* the fact that section 76(2) *only* refers to section 76(1) and makes no mention of section 74 (*Canteen of Canada*, *supra*, and the majority decision in this case). These strained interpretations of the Act are easily avoided if the interpretation urged upon us by the respondent in this case is adopted.

7. In my view section 74 was intended to be applicable *only* to strike activity by a union or its members flowing as a direct and immediate consequence of its *intentional* conduct or the conduct of that union's officers, officials or agents. The Act does not, in my opinion, impose any liability on one union or its officers for the strike activity of another union, its officers or members. In other words, under section 74 a union or its officers are potentially liable *only* if it calls or authorizes an illegal strike by its members or if its officers' counsel, procure, support, or encourage an illegal strike by its members. This interpretation looks at section 74 as a unified whole rather than artificially splitting it up into two separate parts as the majority's interpretation does. It also delineates a clear and distinct sphere of application for section 74 which sets it apart from the much broader scope of section 76(1) and which resolves the dilemma of the non-application of section 76(2) to section 74. If section 74 is read as referring only to illegal strike activity by a union initiated *directly* by it or its officers, section 76(2) is clearly inapplicable because there is no question of the illegal activity flowing *indirectly* from the conduct of the union or its officers in relation to a "lawful strike." That is, the sort of indirect causation of illegal strike activity which is contemplated by section 76(2) is excluded from the ambit of section 74 following the interpretation I have suggested and therefore section 76(2) is simply *irrelevant* in relation to section 74. Unions and their officers simply do not need the protection of section 76(2) in relation to the possible consequences of legal picketing by their members because their potential liability under my interpretation of section 74 stops right at their own door-steps. There is thus no need for the Board to continue trying to extend the defence of section 76(2) to section 74.

8 This interpretation of section 74 has the advantage, as noted above, of restricting section 74 to illegal strike activity initiated directly by the union (or officers

of the union) whose members are engaging in the illegal activity. Of course, in a certain sense, section 74 is superfluous in that activity prohibited by section 74 would also constitute conduct which violates section 76(1). Therefore, the purpose of section 74 must be to emphasize the duty of unions and their officers to ensure that their *own* members do not engage in illegal strikes. By creating this separate offence the legislature is simply underlining the “seriousness” of any conduct by unions or their officers that leads to illegal strikes by their own members and delineating a special duty in relation to these parties to ensure that the individuals whom they represent comply with the *Labour Relations Act*. In other words section 74 creates an offence which, although subsumed by section 76, is more serious than the general offence created by section 76 and can be remedied more expeditiously by this Board. That section has three additional conditions beyond the general requirements of section 76:

- (1) it can only be violated by a union, its officers, or agents;
- (2) the illegal activity must be carried out by members of the union which called or authorized the illegal strike or whose officers, officials or agents counselled, procured, supported or encouraged the illegal strike; and
- (3) There must be a *direct* link between the illegal strike and the *intentional* conduct of the union or its officers.

9. The distinction between section 74 and 76 is reflected in the wording of section 92. The first part of section 92, as noted in the majority decision (at ¶19), simply repeats the wording of section 74. Accordingly, I would hold that it only refers to strike activity by members of a union directly initiated by that Union or its officers. The section then refers to “employees engaged in or threatened to engage in an unlawful strike.” These are the *only* categories of situations which the Board is authorized to remedy under section 92.

10. If an application is filed alleging that certain employees are engaging in an illegal strike because other employees are engaging in picketing, the Board does not, in my opinion, have the authority *under section 92* to restrain the *picketing*. It may have the authority to order the employees engaged in the illegal strike to cease and desist from this illegal activity but this is not at issue in this case because the applicant did not request a cease and desist order in relation to its own employees. I would hold that section 92 can only be used to restrain:

- (1) conduct by a union or its officers which can be directly linked to the illegal strike activity by its own members; or
- (2) illegal strikes by employees, but cannot be used to restrain picketing or other conduct which may have precipitated the strike.

11. The only authority that the Board has to regulate picketing which is causing illegal strikes is under section 76. Section 92 makes it clear that the indirect causation of illegal strike activity contemplated in section 76(1), that is, picketing, is not dealt with under section 92. In my opinion, the remedial portion of section 92, which is worded very broadly, must of course, be read in relation to the initial portion of the

section which clearly identifies the conduct that the Board can address in the applications under this section. Therefore, I would have dismissed this application under section 92 on the grounds that it did not seek to restrain the applicant's own employees, (i.e. the employees who were alleged to have been actually engaging in the illegal strike) but rather, sought to only restrain the picketing of other persons who were not employees of the applicant.

12. The only section of the Act which the applicant could have alleged a prima facie violation of was section 76(1). A complaint to deal with an alleged violation of this section could have been filed under section 89. However, it chose not to do so and I would not have considered it as a complaint under this section in the circumstances of this case. The respondent was prejudiced by the processing of the application under the Board's expedited hearing procedure used for proper section 92 applications, which this case was not. At the least, I would have granted the respondent an adjournment of 2 or 3 weeks in order to allow it time to prepare its case.

13. Because the majority viewed this application as a complaint under section 89, I feel it is necessary for me to indicate how I would have disposed of this case had it been properly filed as a section 89 complaint. First, as I stated earlier, I do not think that the applicant established that "unlawful strikes" took place and I would have dismissed the complaint on this ground alone. However, I would like to discuss some of the issues addressed in the majority decision relating to the application of section 76(2) and the use of the ally doctrine because, again, I find myself unable to agree with the conclusions of the majority.

14. Twenty years ago, Ontario took a giant step backwards in labour relations when the Ontario Court of Appeal declared in the *Hersees* case that "secondary picketing" is illegal "per se". This case has attracted a good deal of critical comment, (see e.g. Arthurs, "*Labour Law - Secondary Picketing - Per Se Illegality - Public Policy*" in (1963) 41 Can. B. Rev. 580; Beatty "*Secondary Boycotts: A Functional Analysis*" (1974) 52 Can B. Rev. 388). Just at the time when the NLRB and the courts in the United States were developing a comprehensive set of rules to regulate secondary industrial activity, the Ontario courts attempted to ban it altogether. The result has been that the Ontario courts, to their credit, have spent the last 20 years back pedalling from *Hersees*. This has been accomplished by defining "secondary picketing" progressively more restrictively so as to allow more exceptions to the "per se" illegality rule. Fortunately, one of the deficiencies in the reasoning in *Hersees* is that absolutely no definition of secondary picketing was even attempted. Through the cases applying section 20 of the *Judicature Act* in determining whether an injunction is being sought in relation to a labour dispute, the courts have moved towards a version of the ally doctrine.

15. Recently, this Board disclosed its intention to begin regulating picketing in relation to legal strikes. (See *Sarnia Construction Assoc.*, [1982] OLRB Rep. June 922). However, I am disappointed with the result in this case in terms of the Board's application of the ally doctrine. I had hoped that this Board would go beyond the position of the Ontario courts and the NLRB to recognize that strikers have a right to protect their employment by following struck work wherever it is performed and to picket the employer who is doing the struck work.

16. Employees on strike have a three-fold objective during a strike:

- 1) to cause temporary economic loss to the employer in order to pressure it into offering better terms and conditions of employment;
- 2) to prevent the struck work from being done by other employees of their employer; and
- 3) to prevent the struck work from being done by another employer with the result that the struck employer loses his share of the market thus causing the strikers to *permanently* lose their employment.

Of course, this third objective is often beyond the means of strikers but, given the law's refusal to protect their employment interests during a strike, for example, refusal to prohibit the hiring of replacements or the refusal to prohibit the performance of struck work by secondary employers, the law should at least allow them to exert what pressure they can on secondary employers in order to prevent their potential loss of employment opportunity. In short, I would have held that picketing of an employer who is performing struck work during a legal strike is an "act done in connection with a lawful strike" regardless of the nature of the relationship between the struck employer and the secondary employer. Striking employees should be legally able to follow the struck work and establish picket lines wherever it is performed.

17. However, even assuming a narrower test for determining whether the picketing was "in connection with an unlawful strike", i.e. a test in line with the ally doctrine as developed both here and in the United States, I would have held on the balance of probabilities that the applicant was an ally of the struck employers and therefore the picketing was legal. Following the principle set out in the leading cases of *National Automatic Vending* 63 CLLC ¶16,278 and *Webster and Horsefall (Canada) Ltd.*, [1969] OLRB Sept. 780 at 783, I would have held that the onus is with the applicant to prove that it was *not* an ally of the struck employers. This reversal of the normal onus follows from the fact that the "subject matter of the allegations lies peculiarly within the knowledge of one of the parties" (*National Automatic Vending, supra*). It is instructive in this regard to note that the *Labour Code of British Columbia*, section 85(4), explicitly states that a person who performs struck work is presumed to be the struck employer's ally unless he proves the contrary. This section parallels section 89(5) of the *Labour Relations Act*. However, it is clear that the principle enunciated in *National Automatic Vending* and *Webster* is independent of any statutory provision. In fact this Board applied the reverse onus in unfair labour practice cases long before section 89(5) was enacted and this section simply enshrined the Board's longstanding practices in these cases.

18. I find that the respondent satisfied the initial onus by showing that the applicant was performing struck work and that the applicant had met with the struck employers prior to the commencement of the strike in order to discuss collective bargaining strategy across the industry. Furthermore, there was evidence to the effect that the struck work would probably *not* be retained by the applicant after the strike was over. How did the applicant know this? In relation to one plant, there was also evidence that the applicant had a billing arrangement with the struck employers. In light of this

evidence, I find that the onus shifted to the applicant to prove that it was not an ally of the struck employers and that the applicant was obliged to adduce *substantial* evidence to disprove the respondent's allegation. I find that the applicant has not met this onus. Little weight can be attached to the oral evidence of employees of the applicant in light of the following factors:

- 1) as "loyal" employees of the applicant they are obviously not disinterested parties;
- 2) precisely because the subject matter of the allegations lay "peculiarly within" the knowledge of the applicant there is little chance that cross-examination will dig up anything to shake the stories of the witnesses.

I am not suggesting that these witnesses perjured themselves. I am simply saying that little weight can be attached to their evidence and that, therefore, given the reverse onus which is applicable, the applicant has not established, on the balance of probabilities, that it did not ally itself to the struck employers in order to ameliorate the effects of the strike. I find myself irresistibly drawn to the inference that in fact there was some sort of "arrangement," or at least a tacit understanding of how to react when another employer was struck, within the industry. Just to indicate the sort of evidence I would have required from the applicant in order to meet the onus of proof on this issue, I would have required full disclosure of all the production and financial records of the company from one year prior to the commencement of the strike up to the date of the application with independent audits of all the financial records. Of particular interest would, of course, be detailed written records of any contracts (including *detailed* descriptions of all billing and payment arrangements) entered into between the applicant and its customers to pick up work done by the struck employers prior to the beginning of the strike. If there were no such written records I would, again, have held that the applicant had not discharged the onus of proving that it was not an ally of the struck employers.

19. In conclusion, I would like to reiterate my disappointment that this Board did not adopt a broader approach in interpreting section 76(2), an approach which would have gone beyond the reluctance of the Ontario courts and the NLRB in protecting the interests of striking employees. To suggest that legal picketing of all employers who perform struck work would give unions "too much power" is manifestly absurd. In fact it would be merely a first step towards a more equitable balance of power between employers and unions in the market place.

20. The Ontario labour movement has often called for the legal prohibition of the replacement of struck labour in any form, whether by the struck employer himself or by secondaries. Unfortunately, we must wait for the legislature to make these changes. Nevertheless, this case could have been an opportunity for this Board to make some small changes in order to redress the obvious inequity arising from a narrow and restrictive interpretation of our laws in relation to industrial conflict.

0567-82-U United Steelworkers of America and its Local 7291, Complainants, v. **Globe Spring & Cushion Co. Ltd.**, Kelson Spring Products Limited, and Regal Spring Company, Respondents

Damages – Duty to Bargain in Good Faith – Interference in Trade Unions – Remedies – Unfair Labour Practice – Refusal to disclose wage rates of unit employees breach of bargaining duty – Limits of freedom to communicate exceeded by negotiating directly with employees – Board refusing to award what amounts to punitive damages

BEFORE: R. D. Howe, Vice-Chairman, and Board Members W. H. Wightman and B. L. Armstrong

APPEARANCES: *J. Sack, Q. C., Lorne Richmond, and F. Rao for the complainants; R. M. Parry, Malcolm Marcus, Harry Marcus, K. Rasminsky, and Henry Kelson for the respondents.*

DECISION OF R. D. HOWE, VICE-CHAIRMAN, AND BOARD MEMBER B. L. ARMSTRONG; September 9, 1982

1. This is a complaint under section 89 of the *Labour Relations Act* in which the United Steelworkers of America (hereinafter referred to the “Union”) and its Local who is the Chairman of the Board of Directors of the respondent Globe Spring and Cushion Company Limited (“Globe”), and his son Malcolm, the President of Globe, contrary to the provisions of sections 3, 15, 64, (a) and (c), 67(1), and 70 of the Act, in that they bargained in bad faith, bargained directly with employees whom the Union was entitled to represent, interfered with the administration of the Union, and otherwise violated the Act as specified in the statement of particulars attached to the complaint filed with the Board on June 18, 1982.

2. By letter dated July 6, 1982, the complainant, through its solicitors, sought leave of the Board to amend the complaint so as to add Kelson Spring Products Limited (“Kelson”) and Regal Spring Company (“Regal”) as respondents, and filed additional particulars alleging that the respondents had failed to comply with a demand made by the complainant during the course of collective bargaining that it be informed of the actual wage rates which their respective bargaining unit employees had been receiving prior to the lawful strike which commenced on May 25, 1982.

3. In a majority decision dated July 26, 1982 in this matter, the Board wrote as follows:

“5. Having regard to all of the evidence and the submissions of the parties, the Board finds that Globe contravened sections 15, 64, and 67(1) of the Act by bargaining directly with some of its employees whom the Union was (and is) entitled to represent, and thereby interfered with the representation of employees by the Union. The Board further finds that each of the respondents contravened section 15 of the Act by refusing to disclose to the Union the actual wage rates which their respective bargaining unit employees had been receiving prior to the lawful strike which commenced on May 25, 1982.

6. The Board, therefore, declares:

1. that the respondent Globe Spring & Cushion Co. Ltd. has contravened sections 15, 64, and 67(1) of the Act; and
2. that the respondents Kelson Spring Products Limited and Regal Spring Company have contravened section 15 of the Act.

7. To remedy those contraventions of the Act, the Board orders:

1. that the respondent Globe Spring & Cushion Co. Ltd. desist from bargaining directly with employees whom the complainant trade union is entitled to represent;
2. that the respondents Globe Spring & Cushion Co. Ltd., Kelson Spring Products Limited, and Regal Spring Company, forthwith inform the complainant of the actual wage rates that were being paid to their respective bargaining unit employees prior to the lawful strike which commenced on May 25, 1982;
3. that the respondent Globe Spring & Cushion Co. Ltd., on receipt of this decision, convene forthwith a series of bargaining meetings between itself and the complainant trade union, with the assistance of a Ministry of Labour mediator, at such times and for as long as the mediator deems necessary, and bargain in good faith and make every reasonable effort to make a collective agreement with the complainant (which meetings may also be attended by representatives of the other respondents); and
4. that the respondent Globe Spring & Cushion Co. Ltd., at its own expense, mail a copy of the attached notice marked "Appendix" after being duly signed by an authorized representative of that respondent, to the residence of each of its bargaining unit employees, including each of its employees who is, or has been, engaging in the lawful strike which commenced on May 25, 1982.
8. Detailed reasons for the majority decision in this matter will issue at a later date."

The purpose of this decision is to provide those detailed reasons.

4. The Union and the respondents have entered into a series of collective agreements and enjoyed a relatively successful collective bargaining relationship for a number of years. The most recent of those collective agreements was entered into on August 26, 1980, and remained in force until March 31, 1982. The parties to that agreement were the Union, the three respondents, and two other companies, Regal Arc Limited and Acme Spring Products Ltd. During the current round of negotiations which

gave rise to this complaint, the respondents have continued to bargain together through a common bargaining committee.

5. During January of 1982 the Union gave the respondents (and the other parties to the collective agreement) notice to bargain. The Union forwarded a comprehensive set of proposals to Bruce Binning, who was the lawyer representing the employers for purposes of collective bargaining. The first negotiation meeting between the Union and the employers' representatives was held on March 18, 1982. The Union's bargaining committee consisted of Fortunato Rao (a Staff Representative who has been with the Union for sixteen years), M. Baird (an employee of Globe), H. Patel (an employee of Kelson), I. DeRose (an employee of Regal), and A. Jameeu (an employee of Acme). The members of the employers' bargaining committee were Mr. Binning, Harry and Malcolm Marcus (for Globe), Henry Kelson (for Kelson), Ken Rasminsky (for Regal) and Vito Mauro (for Acme).

6. A second bargaining session was held on March 30th, the day on which the Union applied for conciliation. A conciliation meeting was held on May 4th and the committees met with a mediator on May 19th. On May 25th the employees voted to reject the employers' offer, which included a wage increase of 5% on April 1, 1982 and 2% on January 1, 1982 for a one year collective agreement (to be in force from April 1, 1982 to March 31, 1983), and embarked upon a lawful strike that same day. The Union's monetary demand at that time was 10% for a one year agreement "plus some changes in language and benefits", although it "had not shut the door to a two year agreement".

7. With the commencement of the strike, R. M. Parry (who was counsel for the respondents at the hearing of this matter) replaced Mr. Binning as the lawyer on the employers' bargaining committee to meet on the afternoon of May 26th in a room provided by the Company at the Yorkdale Holiday Inn, while Mr. Parry met with the employers' representatives in another room. After about three hours of discussion, those meetings adjourned without a settlement having been achieved.

8. At a meeting convened by the mediator on June 10th, the employers tabled a new offer which included proposed wage increases of 7% ("over existing rates") on ratification, 7% ("over then existing rates") on April 1, 1983, and 2% ("over then existing rates") on April 1, 1984 (for an April 1, 1982 to November 30, 1984 collective agreement). Although the Union had not revised its demand for a 10% increase for a one year contract, it placed the employers' June 10th proposal before the membership on June 13th. After Mr. Rao had explained the proposal "article by article" and had "made it loud and clear that the bargaining committee was not recommending the proposal but [that] the decision was in [the members'] hands", 74 members voted to reject the offer and only 21 members voted in favour of accepting it.

9. Late in the afternoon on Monday June 14th, S. Gandhan, one of the employees on the Globe picket line, telephoned Mr. Rao at his office and told him that the employees had received an offer from management which they had voted on and accepted. Mr. Rao informed Mr. Gandhan that it was "wrong and illegal for management to do what they did with the workers" and requested him to relay that information to the people on the picket line. Mr. Rao also received a telephone call that afternoon from Gary Kilmer, a Union Steward employed by Globe, who asked him to call management.

10. Mr. Kilmer was summoned to testify before the Board by the Union. We found him to be a candid witness whose credible testimony we accept without reservation. Mr. Kilmer told the Board that he and several other Globe employees who were on the picket line went into Globe's front office at approximately 10:30 a.m. on Monday June 14th. It appears that some of the picketing employees had entered the lobby of their own volition from time to time during the strike for the purpose of having coffee and discussing the strike. While they were in the lobby on the morning in question, Mr. Kilmer and approximately seven other Globe employees approached Harry Marcus, who invited them into his office. The employees expressed concern that no bargaining sessions were being held between management and the Union. They also discussed with management many of the matters in dispute, including Globe's proposal to reduce the piecework rate for "Box Spring Grid Stapler" by 10%. When Mr. Kilmer asked if the proposed reduction could be revised from 10% to 5%, Mr. Marcus said, "Yes, it's agreeable." Mr. Kilmer also asked "if there'd be an offer made on safety boots" and was offered "\$15.00". When Mr. Kilmer said that \$15.00 was not enough, management "increased their offer to \$20.00". The employees then told management that they would "have to take it outside to the men". Other items which the group discussed with Harry Marcus included shift premium, holidays, overtime pay, vacation pay, "seniority on a departmental basis", "weekly indemnity", and the employees' preference for an increase of "7% and 7% over 2 years" instead of 7%, 7%, and 2% over a longer period.

11. The "discussions" between management and the group of employees lasted for about three hours. Malcolm Marcus, who was the sole witness called by the respondents in these proceedings, was present during only part of that time since he arrived after the employees began talking with his father, left about an hour later, and subsequently returned at a time when the discussions were still ongoing. Thus, his denial that the Company bargained directly with the employees that day is of limited evidentiary value in the absence of similar testimony from his father who was present throughout the discussions with the employees that day. Moreover, having regard to our assessment of their relative credibility, we prefer the evidence of Mr. Kilmer where it conflicts with that of Malcolm Marcus whose recollection of the events in question was somewhat limited. In making our findings of fact, we have also had regard to the failure of Globe to call Harry Marcus as a witness despite the fact that he was in attendance at the hearing (having been summonsed, but not called, by the complainant). The fact that Globe did not call Mr. Marcus to testify in the circumstances of this case justifies the Board in drawing the inference that his evidence would have been unfavourable to Globe's case, or at least would not have supported it (see *B & S Furniture Manufacturing Limited*, [1980] OLRB Rep. May 645, and the authorities contained therein).

12. After that meeting, Mr. Kilmer telephoned Mr. Rao, briefly advised him of what had transpired, and asked him to call management. Mr. Rao was in a meeting concerning another matter when he received Mr. Kilmer's call. At the conclusion of that meeting (at approximately 5:00 p.m.) Mr. Rao telephoned Malcolm Marcus, confronted him with the information that he had received from Mr. Kilmer and the other employees, and told him that what the Company had done was "wrong and illegal". Although Mr. Marcus told the Board that he immediately denied Mr. Rao's allegation that management had been bargaining directly with employees, we accept Mr. Rao's evidence that Mr. Marcus did not deny that allegation, but rather attempted to make

light of it. Mr. Marcus accepted Mr. Rao's suggestion that he meet with Mr. Rao and the President of Local 7291 that evening at 6:00 p.m. at the Columbus Centre. Mr. Marcus then spoke with Mr. Parry and with representatives of Kelson and Regal.

13. At the meeting at the Columbus Centre, Malcolm Marcus gave Mr. Rao a copy of a revised employers' proposal that included a number of the items which management had discussed with employees earlier that day, including the reduction of Globe's piecework rate for "Box Spring Grid Stapler" by only 5%, instead of 10% as previously proposed to the Union; the revision of the expiry date of the proposed collective agreement from November 30, 1984, to March 10, 1984, with a concomitant deletion of the previously proposed 2% increase on April 1, 1984; and an employer contribution of "\$20.00 per employee per year toward the purchase of safety shoes". The proposal also contained a number of other contract improvements which had not previously been offered to the Union, such as four weeks' paid vacation after fourteen years instead of fifteen years, a 10¢ increase in the afternoon shift premium, a 15¢ increase in the night shift premium, the upgrading of the wage rate for truck drivers from "Class VI" to "Class VII", an increase in the "weekly indemnity" maximum from \$133.00 per week to \$160.00 per week, and an additional "2 hrs. day before X-mas" and "2 hrs. day before New Years" holidays. It also contained a new employers' proposal that seniority be changed from being on a "plant-wide" basis to a "departmental basis"; however, when Mr. Rao described the "problems" that could arise as a result of "departmental seniority", Mr. Marcus agreed to delete that item from the proposal. Although Mr. Marcus attempted in his evidence before the Board to minimize the role which management's "discussions" with the group of bargaining unit employees played in the formulation of the revised proposal that was presented to the Union that evening, we are satisfied that management's direct negotiations with employees earlier that day were quite influential in the preparation of that proposal.

14. After the employers' proposal had been discussed for about an hour, Mr. Rao told Malcolm Marcus that although there had been significant movement by management, he could not recommend acceptance of that proposal as there were still some unresolved issues. Mr. Marcus then requested Mr. Rao to table a proposal that he (Mr. Rao) would be prepared to recommend to the workers, and Mr. Rao agreed to do so as soon as possible.

15. Later that evening Mr. Rao met at the Union hall for several hours with all of the available members of the Union bargaining committee and prepared a set of proposals which the committee was prepared to recommend to the membership. Those proposals were typed by Mr. Rao's secretary the following morning (June 15th) and were delivered to each of the employers (with the exception of Acme, which had "gone bankrupt") by Mr. Rao later that day. After receiving the Union's proposal, management contacted the bargaining unit employees with whom they had met on the previous day and requested them to come to the Globe office. Accordingly, Mr. Kilmer and other employees met with management around 6:00 p.m. on June 15th and were told that the Union's latest proposal was not acceptable but that what the Company had proposed to the employees on the previous day would stand. In response to a question by Mr. Kilmer or one of the other employees as to whether there was "any way to go around the Union", Malcolm Marcus said that there might be a way, if the employees picked a president, a vice-president, a steward, and some shop bargaining people, but that it was

a matter to be decided by the employees. Management also provided the employees with copies of the written proposal which had been presented to the Union on the previous evening. At the end of the meeting, the employees told management that they would take Globe's proposal to the men for a vote on June 16th. Harry Marcus told them that the men could vote in the lunchroom or in one of the offices, but one of the employees rejected that idea because he felt that the men "wouldn't come in".

16. On the morning of June 16th, Mr. Rao attended at the Globe picket line and told the employees that they should not "go in to deal with Malcolm Marcus or Harry Marcus". Accordingly, he was furious when he was informed by several of the picketers at approximately 1:00 p.m. that day that "the strike was over" in that some of the employees had gone into the office, engaged in "another set of negotiations", and voted on the picket line to accept the Company's offer. He was also informed that management had told some of the Globe employees that if they returned to work and the employees at Kelson and Regal received a greater increase, they too would be given that increase, but if the employees at Kelson and Regal received less, Globe employees would nevertheless continue to receive the full amount of the increase which Globe had agreed to pay. Many of the employees, including Mr. Kilmer, crossed the picket line at Globe on June 17th and returned to work. Others planned to remain on the picket line until they received their "strike pay" on Friday June 18th and then to return to work on the following Monday.

17. The present complaint was filed with the Board on June 18th. On Monday June 21st the Union (in the words of Mr. Rao) "had so many brothers and sisters on the picket line that [they] were able to convince the people not to go in. . . ." Mr. Rao also advised the Board that as of July 19, 1982, the first day of the hearing of this matter, the strike was continuing with very few employees, if any, crossing the picket line. Although Mr. Rao had discussions with Mr. Parry between June 21st and the hearing of this matter, and although the parties had a bargaining meeting on July 13th, no settlement had been achieved as of July 20, 1982 when the hearing of this matter concluded.

18. At the commencement of the hearing of this complaint, counsel for the respondent advised the Board that his clients were prepared to admit that they did not forward to the Union the information concerning actual wage rates being paid to bargaining unit employees prior to the commencement of the strike, which information was requested by Mr. Rao after the commencement of the strike as a result of "rumours" amongst the employees that some workers were receiving substantially greater remuneration than others in the same classification. When asked in examination in chief why Globe had refused to respond to that request for information, Malcolm Marcus replied:

"For a couple of reasons. It states right in our contract that if we want to pay some of the workers higher than the rate in the contract, we're allowed to. Since we're on strike, we didn't feel any of this information should be passed on to the Union. We've got more important issues to be resolved."

In cross-examination he added that the respondents were acting on the advise of council in refusing to divulge that information to the Union.

19. Did the respondents contravene section 15 of the Act by refusing to disclose to the complainant the actual wage rates (including actual piecework rates) which their respective bargaining unit employees had been receiving prior to the lawful strike which commenced on May 25, 1982. This Board has recognized that one of the principal functions of the duty described in section 15 of the Act is “to foster rational, informed discussion”: see *DeVilbiss (Canada) Limited*, [1976] OLRB Rep. March 49, at paragraph 15. In that case the complainant trade union asked, at its first bargaining session with the employer, to be provided with the existing wage rates and classifications of the employer. In finding the employer’s refusal to provide that information to be a breach of what is now section 15 of the Act, the Board wrote (at paragraph 16):

“... Of additional concern is the respondent’s failure to respond to the complainant’s request at this first meeting for for existing wage and classification information. Particularly in ‘first agreement’ situations, it is little wonder that a complainant would have an incomplete monetary demand until it fully appreciated the current rate of wages paid by a respondent and the detailed nature of its job structure. Rational and informed discussion cannot easily take place until this information is provided to a trade union and thus this aspect of the duty supports its production. As a general matter of policy, if parties are to engage in economic conflict their differences ought to be real and well-defined. It is patently silly to have a trade union ‘in the dark’ with respect to the fairness of an employer’s offer because it has insufficient information to appreciate fully the offer’s significance to those in the bargaining unit. Moreover, a trade union has a duty to all of the employees in the bargaining unit and thus has to be concerned, in a large measure, with equality of treatment. (For the American experience in this area see *J. H. Allison & Co* (1946) 70 NLRB 377; *Whitin Machine Works* (1954), 217 F. 2d 593 (4th Cir.); *Aluminum Ore Co.* (1942), 131 F. Cir.); *Yanman & Erbe Manufacturing Co.* (1951) 181 F. 2d (2nd Cir.); *Truitt Manufacturing Co.* (1954) 110 NLRB 856; and see generally Bortosic and Hartley, [*The Employer’s Duty to Supply Information to the Union: A Study of the Interplay and Judicial Rationalization* (1972), 58 Cornell L. Rev. 23].) Further, in the facts at hand, we have no doubt, when the totality of the respondent’s conduct is considered, that the ‘bad faith’ aspect of the duty also effectively characterizes the respondent’s failure in this regard. But, as noted above, a finding of bad faith is not a prerequisite to a finding that section 14 [now section 15] has been violated.”

Although that case involved a demand for wage information at the outset of collective bargaining in a “first agreement” situation, production of such data may also be required in other circumstances. As observed by the British Columbia Labour Relations Board in *Noranda Metal Industries Limited*, [1975] 1 Can. LRBR 145, at 162, “[o]ne would hardly say that an employer who deliberately withheld factual data which a union needed to intelligently appraise a proposal on the bargaining table was making ‘every reasonable effort to conclude a collective agreement’.”

20. In the instant case, each of the employers' offers with respect to wage increases has been formulated as a specified percentage increase over "existing rates". Thus, it appears that the Union will not be in a position to accurately appraise the actual value of those offers without knowing what the employees' "existing rates" actually are. Furthermore, the continued existence of the Union's bargaining rights might be placed in jeopardy if employees perceived the Union as permitting gross wage differentials to exist within individual classifications within the bargaining unit. Although the Board has some concern about the timing of Mr. Rao's request for this information in light of the fact that as a result of the language contained in the August 26, 1980 to March 31, 1982 collective agreement, he knew at all material times that some bargaining unit employees were receiving remuneration in excess of that specified in the collective agreement, we accept his evidence that until "rumours" began to circulate after the strike commenced, he thought that the differentials were merely a matter of "cents, not dollars", and, thus, was not unduly concerned about them. Accordingly, his failure to request the information in question at or near the outset of negotiations does not, in the circumstances of this case, preclude his subsequent request for same. Moreover, the rumours which have apparently been circulating among at least some of the employees in the bargaining unit, that some employees have been receiving rates substantially higher than those set forth in the collective agreement, may well render employee ratification of any proposal by the respondents more difficult to obtain, thus unduly prolonging the industrial conflict. The respondents' refusal to disclose this information has likely been viewed by employees as lending substance to those rumours. Thus, it may be in the interest of the respondents to reduce or eliminate needless employee dissatisfaction resulting from misperceptions concerning existing levels of remuneration, by providing them, through their bargaining agent, with the true picture.

21. Accordingly, the majority hereby confirms its earlier finding that the respondents contravened section 15 of the Act in the circumstances of this case by refusing to disclose to the Union the actual wage rates (including piecework rates) which their respective bargaining unit employees were receiving prior to the strike.

22. In addition to that contravention of section 15, on the totality of the evidence adduced in respect of this matter it is clear that Globe, through the actions of Harry Marcus and Malcolm Marcus, contravened section 67(1) of the Act by bargaining directly with some of the employees of Globe whom the Union was (and continues to be) entitled to represent. Their actions were intended to, and did in fact, interfere with the representation of bargaining unit employees by the Union. Moreover, their conduct went far beyond the ambit of the employer's right of freedom of expression guaranteed by section 64 of the Act.

23. In considering the extent to which an employer can lawfully communicate with bargaining unit employees during negotiations, the Board wrote as follows in *A. N. Shaw Restoration Ltd.*, [1978] OLRB Rep. May 393:

"17. To what extent can an employer communicate with its employees during the negotiating process? The scheme of the Act contemplates that the acquisition of bargaining rights by a union carries with it an exclusive license to bargain on behalf of the employees in its bargaining unit. The exclusivity of the union's

bargaining rights is expressly protected by section 59 [now section 67], which reads:

59.-(1) No employer, employers' organization or person acting on behalf of an employer or an employer's organization shall, so long as a trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with any person or another trade union or a council of trade unions on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.

(2) No trade union, council of trade unions or person acting on behalf of a trade union or council of trade unions shall, so long as another trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with an employer or an employers' organization on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.

This section prohibits employers from bargaining directly with employees represented by a bargaining agent, and rival unions from bargaining on behalf of such employees.

18. The existence of this well-established principle of exclusivity of bargaining rights means that employers must be circumspect when communicating with employees represented by a bargaining agent, especially when these communications occur during the course of negotiations. The need for circumspection on the part of employers, however, does not mean that all communications between employer and employees are prohibited. Section 56 [now section 64] of the Act, prohibiting employer interference with the formation, selection or administration of a trade union or the representation of employees by a trade union, expressly provides that this very general prohibition does not 'deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence'. Where communications occur between employer and employees during negotiations, the Board must draw a line dividing legitimate freedom of expression from illegal encroachments upon the union's exclusive right to bargain on behalf of the employees. The line is not an easy one to find, and can only be discovered by asking whether such communications in reality represent an attempt to bargain directly with the employees. If employer communications can be characterized in this manner, they must be regarded as unduly influencing employees and, therefore, falling outside the protection provided to freedom of expression in section 56. Once outside this protected area, such communications can be character-

ized as a violation of section 59 of the Act, and also a violation of the duty to bargain in good faith if they serve to undermine the viability of the bargaining agent.”

(See also *Radio Shack*, [1979] OLRB Rep. Dec. 1220 at paragraph 75; and *The Citizen*, [1979] OLRB Rep. Mar. 177.)

24. In the present case it cannot be said that management was merely attempting to explain its bargaining position to the employees, to set the record straight by clearing up a perceived misunderstanding on the part of employees, or to otherwise lawfully exercise its right of freedom of speech. The employee initiated discussions became, through the reactions of management, a bargaining session at which proposals and counterproposals were exchanged on a number of significant issues on June 14th. Although management met with the Union later that day, it met directly with the group of bargaining unit employees again on June 15th, and arranged for an informal employee “vote” to be taken concerning Globe’s proposal on the following day.

25. While Malcolm Marcus may have initially advised the employees on June 14th that Globe could only bargain with the Union which was their legal bargaining agent, it is apparent that neither he nor his father adhered to that position. By bargaining directly with employees, management sought to weaken the Union’s bargaining strength by obtaining a commitment from individual bargaining unit employees to support particular settlement proposals, in the formulation of which they had been directly involved. While the initial approach was made by a group of employees who were concerned about the lack of progress in negotiations between the Union and Globe, management improperly utilized the overture as a basis for engaging in illegal direct negotiations with bargaining.

26. Management’s direct bargaining with those employees contravened not only sections 64 and 67 of the Act, but also section 15. A very important function of the bargaining duty contained in that provision is reinforcement of an employer’s obligation to recognize a trade union selected by employees as their bargaining agent. (see, *DeVilbiss (Canada) Limited, supra*, and the authorities referred to in that decision). Attempts by an employer to bargain directly with his employees undermine that obligation and, therefore, are antithetical to good faith collective bargaining and the duty to make every reasonable effort to make a collective agreement. Although cases in which section 15 is called upon to play that reinforcing role generally occur in “first agreement” situations, they can also arise in the context of negotiations for renewal of a collective agreement.

27. As indicated above, to remedy those contraventions of the Act, the Board ordered Globe to cease and desist from contravening sections 15, 64, and 67(1) of the Act, to convene a series of bargaining meetings between itself and the Union with the assistance of a Ministry of Labour mediator, and to mail a copy of a notice prepared by the Board to the residence of each of its bargaining unit employees, including each of its employees engaging in the lawful strike which commenced on May 25, 1982. Although counsel for the Union also sought an award of damages, the Board declined to grant that remedy in the circumstances of this case. One of the reasons that damages were not awarded in this case is that it is far from apparent that the Union, or the employees

whom it represents, suffered any actual monetary loss as a result of Globe's contraventions of the Act. Although counsel for the Union suggested that management's conduct may have prolonged negotiations, we are not satisfied on the basis of the evidence before us that such has been the case. At the time of the illegal conduct, a lawful strike had been in progress for several weeks, the parties were at impasse, and no further bargaining sessions had been scheduled. Although management's illegal conduct temporarily weakened the effectiveness of the strike by inducing some of Globe's employees to cross the picket line on Thursday June 17th and Friday June 18th, the effectiveness of the strike was fully restored on the following Monday. Moreover, it cannot be said that the only reason that employees of Globe were on strike after June 20th was the employer's illegal conduct. (Cf. *Fotomat Canada Limited*, [1982] OLRB Rep. July 1020.) On the contrary, it may reasonably be inferred from the evidence before us in this matter that the strike continued because of the Union's determination to obtain a settlement which adequately fulfilled its collective bargaining objectives. Thus, there is no evidence that the employer's actions permanently weakened the employees' determination to obtain improved terms and conditions of employment through legal economic sanctions applied against the employer in the context of collective bargaining. Indeed, management's conduct may well have "backfired" by rekindling the resolve which had earlier prompted employees to withdraw their labour.

28. Furthermore, it appears to the Board that what the Union actually seeks in the present case is punitive damages, rather than compensatory damages of the type usually awarded by the Board. Where it is of the opinion that penal sanctions could be appropriate in respect of a violation of the Act, the Board may grant leave to prosecute under section 101 of the Act in response to a timely application. However, where as in the present case, employer misconduct can be promptly and adequately redressed by other remedial action, penal sanctions are neither desirable nor appropriate. This is not a "first contract" situation in which an employer has engaged in a series of anti-union activities designed to thwart employee desires for collective bargaining. Rather, it is a case involving an established collective bargaining relationship which has yielded a series of collective agreements, but has been temporarily derailed by management's failure to resist the temptation of attempting to bring an end to a lawful strike by bargaining directly with some of its striking employees. The Board's remedial order, issued shortly after the hearing of this matter, was designed to get that relationship back on the tracks as quickly as possible so that the parties could focus their energies once again on the collective bargaining process rather than on the Board's adjudicative process. Retaining jurisdiction to award or quantify damages in the event that negotiations prove unsuccessful (as suggested by Union counsel), could serve to unduly prolong the diversion of the parties' attention from the collective bargaining process. As recently noted by the Board in *Canada Cement Lafarge Ltd.*, [1981] OLRB Rep. Dec. 1722, at paragraph 26:

"... not all violations [of the bargaining duty], be they by employers or trade unions, are properly remedied by monetary compensation. For example, failures to rationally discuss items as in *CIL*, [1976] Rep. May 199 or to provide vital information as in *De Vilbis*, *supra*, are best remedied by a simple direction. Even if there exists the possibility of some monetary loss occasioned by the resulting delay, this Board should, in the normal course of events, be reluctant to

evaluate the loss in monetary terms. Serious consideration of such claims may deflect the Board and the parties from the central purpose of the complaint and add unwarranted time in the processing of such matters. The difficult questions of causation associated with such potential loss particularly raise this spectre and with nowhere near the same justification for a compensatory approach as exists in the blatantly bad faith situation such as in *Radio Shack* and *Fotomat*, *supra*. Judicial approaches in respect of damage assessments draw their purpose from the substantive law of torts and contracts and therefore should not be imported wholesale into labour relations. This Board must be sensitive to the purpose of its own statute and the particular provisions being construed in fashioning remedies. . . .”

29. For the foregoing reasons, the majority decision dated July 26, 1982 in this matter is hereby confirmed.

DECISION OF BOARD MEMBER W. H. WIGHTMAN;

1. Two aspects of the majority decision trouble me given that, whatever the state of the relationship between Globe and the union may be, the general employer/employee relationship appears to be good as evidenced by the casualness with which picketing employees visited in the premises to have coffee and conversation.

2. In this atmosphere it is uncomfortable to make a finding that the employer engaged in “misconduct” in its discussions which had been initiated by Gary Kilmer, a union steward and employee. Nevertheless I am bound to agree with my colleagues in finding a technical violation by the employer.

3. Although perhaps of less consequence, I do disagree with my colleagues in their finding regarding the refusal to disclose wage rate information. Had this been a “first agreement” situation I might see the issue in a different light. In this case, however, the union negotiated a contract provision which contemplates wage differentials within the same job category or classification. Given the nature of this enterprise the provision no doubt makes sense insofar as both parties are concerned. But it is not a first agreement situation and if the very people whose interests the union purports to represent are not prepared to tell the union what they are being paid, I find it strange that the employer should be forced to do so.

4. If the furtherance of a harmonious relationship between the employer and employees is one policy objective, I do not believe this decision is pursuant to that objective. I would not have found a violation in connection with the failure to disclose.

5. It is trite but true that this is a type of case which is invariably more happily resolved by agreement of the parties.

2319-81-OH Dennis Wawia, Complainant, v. Inco Metals Company, Respondent

Health and Safety – Employee refusing to follow usual procedure in operating overhead crane disciplined – Refusal not motivated by safety concerns – Discipline not for exercise of statutory rights – Complaint dismissed

BEFORE: Ian Springate, Vice-Chairman, and Board Members W. G. Donnelly and H. Kobryn.

APPEARANCES: *K. A. Valentine, D. Sweezey and D. Wawia for the complainant; D. K. Gray and R. E. Drewe for the respondent.*

DECISION OF VICE-CHAIRMAN IAN SPRINGATE AND BOARD MEMBER W. G. DONNELLY; September 21, 1982

1. This is a complaint under section 24 of the *Occupational Health and Safety Act* alleging that the complainant, Mr. D. Wawia, has been disciplined for acting in compliance with the Act.

2. The complainant is employed as an overhead craneman at the respondent's copper refinery in Sudbury. Prior to the events in question he had been employed in this capacity for about two years. The crane operated by the complainant runs on rails located near the ceiling but has a lifting device which can be lowered to floor level.

3. The events giving rise to this complaint occurred during the "grave-yard" shift which commenced at 11:30 p.m. on May 10, 1981. At about 6:15 a.m. a number of employees were preparing to open a tap hole on the no. 1 furnace. For these employees to complete their work, a large cement tray situated on the floor near the furnace had to be moved. Mr. G. Timmins, a trainee foreman, went into the lunchroom where the complainant was sitting to tell him that the crane was required to move the cement tray. The complainant testified that he nodded his assent and then sat there "for a few seconds or minutes". Some time later Mr. Timmins returned to the lunchroom and again told the complainant to move the tray. The complainant first went to the washroom and then headed towards the steps which lead up to a catwalk from which he could enter the cab of the crane. Before climbing the steps, the complainant stopped to see what was going on at the no. 1 furnace. While the complainant was so engaged, Mr. Timmins again approached him and reminded him of his earlier directions. The complainant, who was upset that a trainee foreman would tell him three times to do a task when he had agreed to do it the first time, replied "I take my orders from the men on the floor and you can go fuck your hat". Presumably this was a reference to the hard hat which Mr. Timmins was wearing at the time.

4. The complainant then went up to the cab of the crane. The crane at the time was sitting beside one of the walls with its lifting device in a raised position. The established procedure in such a situation is for the craneman to first perform a number of safety checks on the crane and then to move the crane to where some chains are normally kept. The lifting device is then lowered and an employee classified as an "anode helper" attaches the chains to the lifting device. If an anode helper is not already

in position to put on the chains, the craneman will motion with his hand or use his horn to attract the attention of a helper. After the chains are attached, the crane is then moved to where the concrete pan is located and an anode helper hooks the chains to the pan. Again if no helper is in position, the crane operator will catch the attention of one of them. Once the chains are hooked to the pan, the operator will generally (and in our view should always) wait for the appropriate hand signal from the anode helper before moving the pan away. The evidence indicates that this procedure had been followed by the complainant himself on numerous occasions without any objection and that he had never previously voiced any concern about the safety of the procedure. It should be noted that in other work areas the crane operator is assisted by an employee classified as a "crane follower". However, in the area where the complainant works, the anode helpers have been given instructions on crane signals and they perform the duties of a crane follower.

5. On the day in question the complainant did not follow the above procedure. Instead, he first performed the appropriate safety checks on the crane and then finding no problems he moved the crane out about six feet from the wall and stopped, with the crane's lifting device still raised. In this location he was still a long way from either the place where the chains are usually kept, or the spot where the cement pan was situated. According to the complainant, he had stopped to wait for someone to signal him, and since no one gave him a signal to put the chains on, there was nothing he could do but just sit there. In light of the established procedure set out above, none of the anode helpers would likely have thought that the complainant might be waiting for a signal. The complainant himself did nothing to attract the attention of any of the anode helpers. The result was that the crane remained motionless about six feet from the wall with its lifting device raised. It is not at all clear how long the crane remained in this position, but before too much time elapsed, Mr. Timmins sent another employee to relieve the complainant.

6. After being relieved, the complainant had a conversation with Mr. Canley, the foreman on duty. Mr. Canley testified that during this conversation the complainant did not seek to justify his refusal to move the crane more than six feet from the wall on safety grounds. For his part, the complainant testified that he told Mr. Canley that all he had done was to refuse to do unsafe work. Whether or not the complainant actually made this statement to Mr. Canley, we are satisfied that the issue before us is whether the complainant's conduct was in fact likely motivated by safety considerations. It is to be noted that even in the complainant's version of his conversation with Mr. Canley, he did not state why he felt the work had been unsafe. The complainant did testify that he referred Mr. Canley to a "reminder card" which had been issued by the respondent to its overhead cranemen. The provisions of the reminder card which could possibly be of any relevance in these proceedings are set out below:

"Rules for Cranemen

5. All crane loads are to be rigged and attached by personnel authorized by the supervision of the department in which the crane

operates or by qualified Maintenance personnel assigned to the work.

6. When the crane operator is handling loads with crane followers, he is to move his load only in accord with standard signals given by authorized persons; this reminder card contains a list of standard signals.

16. The craneman is held responsible for the results of any crane movements. In any situation in which he feels there is danger to persons, or damage to materials or equipment, the crane is not to be moved until he is satisfied that it is safe to do so, no matter what signals are given."

Rules for Crane Followers

12. When two or more men are working on the floor with the same crane one man is to be designated as the one to give signals to the craneman. This will usually be the most experienced man, and throughout the shift or operation he will so position himself as to be able to signal clearly. The signaller is responsible for the result of any crane movement he signals."

7. Following the events set out above, Mr. Canley sent the complainant home for the remainder of his shift, and issued him with a written warning for "(insubordination) refusing to do assigned work". Subsequently, an official of the Ministry of Labour's Health and Safety Branch investigated the matter. This official's report, which is not binding on this Board, stated as follows:

"After investigating the work refusal by D. Wawia on the 11:30 p.m. to 7:30 a.m. shift on May 10, 1981 and after discussions with my supervisors I find that under the Act Section 23(8) that there was no unsafe act or condition, 'machine, device, thing or the work place or part thereof is likely to endanger the worker or another person'.

A craneman does not require signals to move a crane from its place of rest to the workplace unless -

- (1) The craneman's vision is obstructed
- (2) There are electrical wires which may be hazardous
- (3) Attaching or detaching a load."

8. The position being taken by the complainant is that the company's action in sending him home prior to the end of his shift and issuing to him a written warning

violated section 24 of the Act in that section 23 protects the right of an employee to refuse to perform work he believes to be unsafe. The relevant portions of these sections provide as follows:

“23.-(3) A worker may refuse to work or do particular work where he has reason to believe that,

(a) any equipment, machine, device or thing he is to use or operate is likely to endanger himself or another worker;

(b) the physical condition of the work place or the part thereof in which he works or is to work is likely to endanger himself; or

(c) any equipment, machine, device or thing he is to use or operate or the physical condition of the work place or the part thereof in which he works or is to work is in contravention of this Act or the regulations and such contravention is likely to endanger himself or another worker.

24.-(1) No employer or person acting on behalf of an employer shall,

(a) dismiss or threaten to dismiss a worker;

(b) discipline or suspend or threaten to discipline or suspend a worker;

(c) impose any penalty upon a worker; or

(d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder or has sought the enforcement of this Act or the regulations.”

9. There can be no doubt that an overhead crane operator must be constantly alert for potentially dangerous situations. However, in assessing the complainant's actions, we are struck with the fact that at the point in time when he stopped the crane, there was no possible danger to anyone. The complainant had performed the required safety checks on the crane without finding any problems, and since the lifting device on the crane was still elevated, it posed no threat to anyone on the floor. Had it been the case that the complainant was performing his task in accordance with the established procedure and a dangerous situation arose with respect to himself or someone on the floor, then he would have been fully entitled to stop the crane until the dangerous situation no longer existed. At the time that the complainant refused to work, however, there simply was no danger to anyone. Further, we are satisfied that when the complainant stopped working, he did not have any reasonable grounds to believe that he or any other employee was likely to be endangered by his continuing to operate the

crane. Instead, we feel that the complainant's conduct was likely due to the fact that he was upset that a trainee foreman would tell him three times to do an assigned task.

10. The provisions of the reminder booklet do not, in our view, assist the complainant's position. Rule 5 of the Rules for Cranemen provides that crane loads are to be rigged and attached by authorized personnel. According to standard procedure any load would in fact be rigged and attached by one of the anode helpers who have been authorized to do so by management. Rule 6 provides that when a crane operator is handling loads with crane followers, he is to move his load only in accord with standard signals. There can be no question as to the wisdom of this rule. However, at the time in question no load was attached to the crane. Indeed, its lifting device was still raised, and accordingly, Rule 6 simply did not have any application. Rule 16 provides that a craneman is not to move a crane if he feels that it would endanger people, materials or equipment. We are satisfied that no reasonable basis existed for the complainant to feel that such a danger existed at the time when he stopped the crane. Rule 12 of the Rules for Crane Followers (which in this case applies to the anode helpers) is meant to ensure that only one employee at a time is giving signals to a crane operator. At the relevant time, however, the crane was still close to the wall with its lifting device raised and the complainant did not yet require signals from anyone.

11. Having regard to the above, we are satisfied that the complainant's refusal to move the crane at the time in question was not motivated by a belief that to do so would endanger himself or others. Accordingly, we are of the view that the respondent's disciplinary response to the complainant's conduct did not violate section 24(1) of the Act. It was not contended at the hearing that this was a case where the Board should exercise its discretion under section 24(7) of the Act and substitute another penalty for that imposed upon the complainant. We have, nevertheless, put our minds to the issue, and have concluded that the respondent's response to the complainant's conduct was not so out of line or so unreasonable that the Board should substitute another penalty in its place.

12. In the result, this complaint is hereby dismissed.

DECISION OF BOARD MEMBER H. KOBRYN;

1. I have no quarrel with the facts as outlined in the majority decision but I interpret these facts from the point of view of a professional in the safety field with many years experience.

2. This company has a training program for crane operators and crane followers after which they are supplied with a "reminder card" which sets out rules for the safe operation of the overhead cranes. The preamble of this "reminder card" reads as follows:

"The operation of overhead cranes requires careful attention at all times by both cranemen and crane followers. Work in a safe manner having regard to the safety of your fellow worker and yourself."

(emphasis added).

This preamble indicates that safety is to be a full time preoccupation for everyone in the work place including supervisors, cranemen and crane followers. It is not a "sometime thing" which can be turned on or off. Neither can it be approached in a haphazard way as was happening in this department.

3. The "reminder card" rules state that there will be personnel authorized by the supervision of the department to attach all crane loads. Further, one man is to be designated to give signals to the craneman and the signaller is responsible for the result of *any crane movement* he signals. These rules have a definite purpose, namely the safe operation of overhead cranes in the company's plants. Notwithstanding this, the trainee foreman stated that he has seen the complainant move the crane in the past without signals, and further, that he believed the complainant should have done so again on the day in question.

4. This case reminds me of a newspaper article which appeared in the Toronto Star on June 29, 1982 under the title "*An Effective Job Safety Law.*" The article dealt with the right of workers employed by the Toronto Transit Commission to refuse work if they felt that the work or the surrounding conditions were too dangerous. At one point, the article stated as follows:

"That action led to an immediate investigation of T.T.C. safety requirements – *an investigation that concluded the work was safe as long as all the rules laid out in the T.T.C. safety handbook were followed.*"

(emphasis added)

Now let's relate this statement to the facts in this case. The trainee foreman told the complainant to get the crane started and move it. At no time did the trainee foreman designate an "anode helper" to be the craneman's designated crane follower. I suppose you can't blame him for this because there was no procedure in this department to do so. The rules on the "reminder card" were simply ignored.

5. There was a haphazard approach to dealing with the movement of the overhead crane. The craneman had to move the overhead crane on his own to get the chains required to make the lift. Then after he lowered the lifting device an employee classified as an "anode helper" would attach the chains. If an "anode helper" was not already in position to put on the chains, the craneman would have to motion with his hand or use his horn to attract the attention of an "anode helper". After the chains were attached, the crane was then moved to where the lift has to be made and an "anode helper" hooked the chains to the load. Again, if no "anode helper" was in position, the craneman would have to catch the attention of one of them.

6. In reading all of the rules set out in the "reminder card", I am satisfied that the general theme and intent of the rules is to ensure that the craneman is experienced and has the knowledge to operate the overhead crane. Likewise, the crane followers are to be experienced in their job and have the know-how to work with the craneman and signal him properly. Also the craneman is to know with whom he is working. Rule 12 of the Rules of Crane Followers demonstrates this point most clearly when it states:

“When two or more men are working on the floor with the same crane one man is designated as the one to give signals to the craneman. This will usually be the most experienced man.”

No craneman should be faced with the situation described in paragraph 5 above. He should know with whom he is working before he moves the overhead crane.

7. The company's existing procedure does not conform with the rules laid out in the “reminder card”. Not following the rules set out for the safe operation of overhead cranes makes a mockery of the company's safety program and its safety rules. The complainant's decision to suddenly stop ignoring the safety rules laid out in the “reminder card” may be compared to a case of “battle fatigue” where a person who has in the past accepted existing conditions reaches a state of mind where these conditions are no longer tolerable. Consciously or subconsciously, right or wrong, a person must at times take a position.

8. The operation of overhead cranes can be safe if all the safety rules are observed by the supervisors, the cranemen and the crane followers. If the present procedure is allowed to continue, the company may be lucky for a long time but in reality it is playing Russian Roulett with the safety of the people in that particular department. I am sure this is not the intent of the parties. I feel the complainant should not have been disciplined for his actions. Rather, he should have been commended for alerting management to the present haphazard procedure for the movement of overhead cranes.

0001-82-M London Sandblasting & Painting Limited, Employer, v. International Brotherhood of Painters & Allied Trades and the Ontario Council of the International Brotherhood of Painters & Allied Trades, and International Brotherhood of Painters & Allied Trades, Local 1783, Trade Unions, v. Painters' Employer Bargaining Agency, Ontario Painting Contractors Association and Labour Relations Bureau of the Ontario General Contractors Association, Interveners

Construction Industry – Reference – Minister's authority to appoint nominee to arbitration board challenged – Whether collective agreement binding employer with respect to non-construction work as well

BEFORE: Ian Springate, Vice-Chairman, and Board Members J. Wilson and C. A. Ballentine.

APPEARANCES: *P. M. Rusak, Anthony Slegers and Wm. Slegers for the Employer; A. M. Minsky, L. Banack and A. Colafranceschi for the Trade Unions; Robin B. Cumine, Q.C., Herb Butcher and Cliff Haney for the Employer Bargaining Agency and the Ontario Painting Contractors Association; G. Grossman for the Labour Relations Bureau of the Ontario General Contractors Association.*

DECISION OF THE BOARD; September 9, 1982

1. This is a reference to the Board from the Minister pursuant to section 107 of the *Labour Relations Act*.
2. London Sandblasting & Painting Limited ("London") is a sandblasting and painting contractor located in the City of London. Although the firm has apparently done some construction work, the parties are in agreement that most of its work has been outside of the construction industry.
3. London does not seriously dispute the claim that with respect to the industrial, commercial and institutional sector of the construction industry (the "ICI sector") it is bound by the terms of a provincial agreement between a designated employer and a designated employee bargaining agency. The employee bargaining agency is comprised of the International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades, of which Local 1783 was a member until its merger with Local 1590. For ease of reference, the Unions and the Council of Unions will henceforth be referred to simply as "the Union". The employer bargaining agency is comprised of three employer associations. Two of these, namely, the Acoustical Association of Ontario and Interior Systems Contractors Association of Ontario, are concerned primarily with drywall taping, plastering and related work. The third employer association is the Ontario Painting Contractors Association (the "OPCA"), which has as members employers engaged in painting, sandblasting and related work.
4. While London does not seriously dispute the claim that it is bound to the terms of the provincial agreement in the ICI sector of the construction industry, it takes

strong issue with the contention of the Union and the OPCA that the terms of the agreement are also binding on London in the other sectors of the construction industry, as well as on non-construction work.

5. In November of 1981, the Union filed a grievance against London contending that it was failing to abide by the terms of the provincial agreement. This grievance was referred to the Board for determination under section 124 of the Act. (See File No. 1975-81-M.) In February of 1982, the Union filed yet another grievance against London for allegedly violating the agreement, and this too was referred to the Board for determination. (See File No. 0060-82-M.) In that the Board's jurisdiction under section 124 is limited to grievances arising out of the construction industry, the Union decided that a "private" arbitration board or boards should be constituted to hear the grievances. London, however, declined to appoint a nominee to an arbitration board, claiming that the work in issue was all non-construction work and hence outside the scope of the agreement that the Union was purporting to grieve under. The Union then requested that the Minister exercise his authority under section 44(4) of the Act and appoint a nominee to act on London's behalf. London objected to the Minister making such an appointment, and the Minister referred the matter to the Board.

6. At the hearing, the parties were in agreement that there had been a misunderstanding among the Ministry of Labour officials handling this matter concerning the true basis for London's objection to having the Minister appoint a nominee to an arbitration board on the Company's behalf. The parties were also in agreement that as a result of this misunderstanding, the Minister had posed the "wrong" question to the Board. The question posed by the Minister was whether he had the authority to appoint a member to an arbitration board "having regard to the pending proceedings before the Labour Relations Board under section 124 of the Act". The parties agree that since this Board cannot concern itself with non-construction industry grievances, the two section 124 referrals cannot by themselves bar a consideration of the grievances insofar as they relate to non-construction work by one or more "private" arbitration boards. Indeed, the parties reached agreement that if one or more such boards are established, it or they should deal with all aspects of the grievances, both construction and non-construction, notwithstanding the two section 124 referrals. In these circumstances, we propose to concern ourselves with the real issue in dispute between the parties, and to advise the Minister as to our views thereon.

7. The evidence establishes that it is not unusual for a painting and sandblasting contractor to do both construction and non-construction work. Although the proportion between ICI construction and other types of work varies from contractor to contractor, over half of all the work performed by all "unionized" painting and sandblasting contractors in Ontario is non-ICI work. We are satisfied that prior to the advent of provincial bargaining in 1978, a practice had developed of negotiating collective agreements covering all types of construction and non-construction work as well.

8. London had been involved with negotiations with the Union at least as far back as 1971. In that year a collective agreement was entered into between the Union's Ontario Council and the Painting & Decorating Contractors Section of the London and District Construction Association. Not only was London a member of this association, but one of its officers signed the collective agreement. The "scope of work" clause of

the collective agreement was very broad and appeared not to be limited only to construction work. The evidence indicates that the agreement was in fact applied to both construction and non-construction work.

9. The collective agreement referred to above was replaced by a similar agreement in 1973. In 1975, a single province-wide agreement was entered into between the Union and the Labour Bureau of the Painting & Decorating Contractors Association. There is no evidence before us to indicate that London was a member of this association or bound by the terms of the collective agreement. It is of some interest to note, however, that the "scope of work" clause in the agreement was almost identical to that found in the earlier London area agreements to which London had been bound.

10. In late 1976 or early 1977, the OPCA was formed. On February 10, 1977, London applied for membership in the association. London's application, which was accepted at an OPCA meeting held on February 16, 1977, stated as follows:

"The undersigned hereby applies for membership in Ontario Painting Contractors Association and agrees to abide by and be bound by the provisions of the Letters Patent and By-laws of the said Association as amended from time to time."

The By-laws of the OPCA provided as follows:

"7. Duties and Obligation of Membership

Each member of the Association shall, by virtue of his application for and admission into membership in the Association be deemed to have agreed to and accepted all of the conditions, duties, rights and obligations contained in the letters patent and supplementary letters patent, if any, or the by-laws as amended from time to time, and without limiting the generality of the foregoing shall be deemed to have agreed as follows:

(a) *To assign to the Association his rights to bargain collectively on his behalf with each and every trade union or council of trade unions with which he is required or becomes required during his membership to bargain collectively with respect to any of his employees in Ontario employed in the painting and decorating industry; provided that this shall not apply to the right to bargain with those unions or council of trade unions with which he is obligated at law to bargain collectively through another employers' association;*

(b) *To authorize and appoint the Association as his exclusive agent to bargain collectively on behalf of himself and all other members with those trade unions or council of trade unions with respect to which the member has assigned his bargaining rights to the Association, and to enter into a collective agreement or collective agreements or other agreements, undertakings or contracts with such trade unions or council of trade unions in accordance with the*

provisions of this by-law and on such terms as the Association considers proper, and to amend, vary, modify, extend, suspend or terminate such agreements.”

(emphasis added).

11. On February 10, 1977, Mr. A. Slegers, the President of London, executed the following document:

“THE LABOUR RELATIONS ACT

AUTHORITY OF EMPLOYER TO ONTARIO PAINTING
CONTRACTORS ASSOCIATION

LONDON SANDBLASTING & PAINTING LTD.
(Name of Employer)

(hereinafter called ‘the Employer’) hereby appoints the ONTARIO PAINTING CONTRACTORS ASSOCIATION to act on behalf of the Employer in all aspects of and all matters concerning or arising out of any collective agreement currently in force between the Employer and the Brotherhood of Painters, Decorators and Paperhangers of America, any Local Union thereof or Council of Local Unions thereof; and

hereby assigns to and vest in the ONTARIO PAINTING CONTRACTORS ASSOCIATION all rights to bargain on its behalf and enter into collective bargaining agreements or any renewal thereof or extension or modification thereto with the Brotherhood of Painters, Decorators and Paperhangers of America, any Local Union thereof or Council of Local Unions thereof in connection with any of the employees of the Employer, and hereby vests in the ONTARIO PAINTING CONTRACTORS ASSOCIATION all necessary and appropriate authority to enable it to discharge all of the responsibilities of an accredited bargaining agent pursuant to the Labour Relations Act of Ontario;

and further appoints the ONTARIO PAINTING CONTRACTORS ASSOCIATION as its agent and representative to make an application or applications for accreditation or to apply to be designated as an employer bargaining agency under the Labour Relations Act of Ontario with respect to such sector or sectors and for such geographical area or areas as it may deem appropriate.”

(emphasis added)

12. The other parties did not dispute the contention of counsel for London that the corporate seal of the Company had never been affixed to the assignment of bargaining rights document set out in the preceding paragraph. In our view, however, the lack of a corporate seal does not make the document defective. In any event, section 51 (then

section 43) of the Act provides that unless a union is notified to the contrary, an employers' association is deemed to bargain on behalf of all of its members and accordingly, all of its members are bound by the terms of any resulting collective agreement. The Union was never advised to the contrary, and accordingly, London became bound to any collective agreements entered into by the OPCA. We would note that shortly prior to the hearing in this matter London purported to withdraw its membership in the OPCA. We are satisfied that this purported withdrawal cannot affect the matters dealt with in these proceedings, albeit that it may well affect the future relationship between the parties.

13. It is to be noted that the by-laws of the OPCA as well as the authorization form set out above did not restrict the OPCA's ability to bargain on behalf of London to the construction industry. In these circumstances, and in light of the accepted practice in the industry of bargaining for both construction and non-construction work together, we are satisfied that London, through its membership in the OPCA, authorized the OPCA to bargain on its behalf with respect to both construction and non-construction work.

14. In July of 1977, the OPCA and the Union entered into a province-wide collective agreement. As a member of the OPCA, London was clearly bound by this agreement. The scope of work clause contained in the agreement was virtually identical to that contained in the London area agreements and the earlier province-wide agreement referred to above. No distinction was made between construction and non-construction work. The evidence indicates that the agreement was in fact applied to both types of work.

15. The next relevant collective agreement in time was the first provincial agreement in 1978. As already noted, the OPCA and two other employer associations were together designated as the employer bargaining agency. The provincial agreement was comprised of a brief "master agreement" and a number of appendices. Appendix "A", which was negotiated by the OPCA was referred to as the Painters' Appendix. The 1980 provincial agreement had a similar format, except that the OPCA negotiated portion of the provincial agreement was not headed up "Appendix 'A'" but rather "Agreement 'A'". There was also an Agreement "B" relating to employees such as drywall tapers and plasterers, as well as an Agreement "C" relating to employees engaged in floor laying. It should be noted that with respect to both the 1978 and 1980 provincial agreements the appendix and the agreement negotiated by the OPCA contained a scope of work clause in the previous collective agreements referred to above. At the end of the 1980 "Agreement 'A'" was a signing page with signatures on behalf of the Union and the OPCA. This was in addition to the signing page at the end of the master portion of the provincial agreement which was signed on behalf of the Union and all three employer associations. The heading and first three articles of "Agreement 'A'", including the scope of work clause, are set out below:

"AGREEMENT 'A'"

BETWEEN:

THE ONTARIO PAINTING CONTRACTORS ASSOCIATION

(hereinafter referred to as the 'Employer')

- and -

THE INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES AND THE ONTARIO COUNCIL OF THE INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES

(hereinafter referred to as the 'Union')

WHEREAS The Ontario Painting Contractors Association is a member of the designated Employers Bargaining Agency;

AND WHEREAS the said Employers Bargaining Agency has authorized and directed The Ontario Painting Contractors Association to negotiate Agreement 'A' with respect to employees engaged in painting and related fields;

ARTICLE 1

PURPOSE AND RELATIONS

1.01 It is the general purpose of this Agreement to promote and improve industrial and economic relations between the Employer and the Union; to assure the continuous, harmonious, efficient, economical and profitable operation of the Employer, to prevent strikes and lockouts, and other disturbances or interferences with production; to secure and sustain high productivity during the term of this Agreement and to obtain the highest level of Employee efficiency and performance; and to set forth the entire Agreement between the Employer and the Union, and the Employees in the Bargaining Unit concerning rates of pay, hours of work and working conditions of employment. It is therefore agreed that the understanding contained herein shall be binding upon all members of both parties, either individually or collectively by facilitating just and peaceful settlements of disputes and grievances.

ARTICLE 2

THE SCOPE OF THE WORK

2.01 The application and/or removal of protective and/or decorative coatings which might be referred to as paints, which in the general sense are; - paints, stains, varnishes, emulsions, bituminous coatings and other organic coatings or inorganic coatings which are applied in the same manner as paints or plastics or mastics, hypalon coatings, fibreglassing and caulking, clear sealer applications, application of all seamless floor coatings, sandblasting for decorative purposes and all other types of sandblasting, all phases of

metallizing, the application of under water coatings, all markings, stenciling or equipment, machinery, etc., with paint, adhesive stickers or spray bombs, the use of reflective tapes in this field of work and the application of all other material used in the various branches of the Trade.

The hanging of all wall covering applied with paste or other adhesives, such as papers, cottons, muslings, burlap, grass cloth, vinyl wall coverings, epoxy [sic] combination coverings, resin cambric backed, etc., and all other wall coverings including the application of rubber sheeting for tank lining and the application of gold or silver and all other metal leaf, etc.

All incidental preparatory work necessary to carry out work outlined above, such as patching small defects in surfaces, puttying, sanding, rubbing, cleaning surfaces with steam or other processes to include hydrojet cleaning (high pressure water), sandblasting, pickling, bleaching, buffing, sealing, machinery and manual scraping, flame cleaning, the application of cleaning fluids, rust inhibitors, taping covering surfaces for their protection from paint, etc., including the use of miscellaneous hand and power driven tools and equipment required for work coming under this jurisdiction, the filling of spray pots and sand pots, the application of all sealers inside or outside, the application of all colour code distinguishing marks and the application of all protective and decorative coatings on all piping, insulated or otherwise.

Building cleaning is defined as the process of removing dirt, stain or discoloration or any unwanted films by use of manually operated scrubbing techniques or by power operated machinery or equipment such as steam blast, water jet blast and/or such other process as will suffice to accomplish the cleaning of buildings, ships, structures, etc.

ARTICLE 3

EMPLOYEE DEFINITION AND RESPONSIBILITY

3.01 An Employee is defined as a Journeyman painter, apprentice painter, paperhanger, fabric hanger, decorator, sandblaster, spray applicator, swingstage man, foreman or sub-foreman, working for any individual firm, co-partnership or corporation. He shall be in good standing with the Union and have completed his apprenticeship and have passed a required examination as to his proficiency as a mechanic to perform the duties pertaining to the painting and decorating industry as an Employee.

3.02 It is the responsibility of each Employee to provide the appropriate personal equipment."

16. The evidence establishes beyond any doubt that when the OPCA and the Union negotiated "Agreement 'A'" they understood and intended that it would apply to both construction and non-construction work, and that by and large members of the OPCA have in fact applied it to both types of work. It is alleged by the Union, however, that commencing in 1981, London failed to apply the terms of the agreement.

17. The position of the Union and the OPCA is that London was bound to the terms of "Agreement 'A'" between the Union and the OPCA with respect to both construction and non-construction work. London, however, contends that it was, at most, bound by the agreement only in the ICI sector of the construction industry. In support of this contention, London relies on the fact that the provincial bargaining sections of the Act relate only to the ICI sector of the construction industry, that section 137(e) defines a "provincial agreement" as one covering employees in the ICI sector, and that pursuant to section 143(a), the rights of individual employers vest in an employer bargaining agency only for the purpose of concluding a provincial agreement.

18. Having regard to the scheme of provincial bargaining as set out in the Act, and section 143(a) in particular, we are satisfied that with respect to any painting or sandblasting contractor for whose employees the Union holds bargaining rights, but which contractor is not a member of the OPCA, the contractor is bound by the terms of the provincial agreement, including Agreement "A", only with respect to the ICI sector of the construction industry. See *Fred Jantz Masonry Construction Company Limited*, [1981] OLRB Rep. Sept. 1229. With respect to other sectors of the construction industry, and non-construction work, it would be up to the Union and such a contractor to negotiate one or more separate agreements.

19. London, however, is not in the position such as that described in the preceding paragraph, for London did become a member of the OPCA. Accordingly, the OPCA did have the right to negotiate on behalf of London for the non-ICI sectors of the construction industry as well as for non-construction work. Rather than negotiate a separate agreement or agreements for this work, the Union and the OPCA decided to negotiate a single document which relates to all types of work. We are satisfied that in so far as the ICI sector was concerned, the OPCA was acting on behalf of the designated employer bargaining agency and exercising rights vested under section 143(a). With respect to the other sectors of the construction industry and non-construction work, however, we are satisfied that it was acting as an employers' association on behalf of its members, including London. Accordingly, we are of the view that London is bound to the agreement not only as a provincial agreement covering the ICI sector, but as a collective agreement covering the other sectors of the construction industry and non-construction work as well.

20. London's objection to having the Minister appoint a nominee on its behalf to a board or boards of arbitration is based on its claim that the agreement being grieved under does not cover non-construction work. We are satisfied that the agreement does in fact cover non-construction work, and that accordingly the Minister does have the

authority to appoint a nominee on behalf of London to a board or boards of arbitration to deal with the grievances filed by the Union.

21. As commented earlier, the parties are in agreement that if a board (or boards) of arbitration is to be established, it would be preferable if it (or they) dealt with the grievances in their entirety, rather than have any construction industry component dealt with under section 124. This being the case, the referrals in File Nos. 1975-81-M and 0060-82-M are hereby terminated.

1008-82-JD Lummus Canada Inc., Complainant, v. The International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 721, James MacDonald and Gilles Bosse and the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 463, Respondent

Jurisdictional Dispute – Practice and Procedure – U.A. and Ironworkers claiming work in dispute – Employer assigning work to U.A. after receiving submissions from both unions – Allegation that employer admitted assignment made in error – Board policy on interim orders not to disturb employer's assignment unless patently wrong – Board not deviating from policy in circumstances even if allegation true

BEFORE: D. E. Franks, Vice-Chairman, and Board Members J. A. Ronson and B. L. Armstrong.

APPEARANCES: *Brian P. Smeenk, T. Ervin and K. Pierce for the complainant; James Hayes, Stan Arsenault and Jim MacDonald for the International Association of Bridge, Structural and Ornamental Ironworkers, Local Union 721, James MacDonald and Gilles Bosse; Laurence C. Arnold, Paul Falzone and Chris Burows for the United Association of Journeymen and Apprentices of Plumbing and Pipe Fitting Industry of the United States and Canada, Local 463; Albèrt Parrent for York Steel Construction.*

DECISION OF THE BOARD; September 3, 1982

1. This is a complaint concerning a work assignment made under section 91 of the Act. In the complaint, the complainant has asked the Board to issue an interim order and a cease and desist order under subsection 9 of section 91.

2. In accordance with section 62 of the Board's Rules of Procedure, the Registrar listed this matter for a consultation with the parties. At this consultation, the Board heard the representations of the various interested parties with respect to the request for an interim order.

3. The work in dispute consists of the off-loading, (otherwise known as power rigging) of exchangers, pumps, vessels, package units, skid units and other piping

equipment. The position of the complainant, Lummus Canada Inc. (hereinafter referred to as "Lummus") is that in early April a mark-up meeting was held at which point the work in question was claimed by both the respondents, the International Association of Bridge, Structural and Ornamental Ironworkers, Local 721 (hereinafter referred to as "Ironworkers Local 721") and the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 463 (hereinafter referred to as "U.A. Local 463"). The complainant requested both trade unions claiming the work to make submissions on their claim. Subsequently, submissions were received and the position taken by the complainant Lummus is that the work was assigned to U.A. Local 463 on the basis of the Ironworkers Local 721 refused to perform work on the Eldorado job site.

4. The position taken by the respondent, Ironworkers Local 721, is that certain of their representatives were told by certain representatives of Lummus that the assignment referred to above had been a mistake. In consequence of which the position taken by Ironworkers Local 721 was that the Board ought to change the assignment made by the complainant Lummus to either a mixed crew of Ironworker members and U.A. members or that the Board ought to assign to Ironworkers units in excess of four thousand pounds.

5. Even if we were to accept as fact in this matter the alleged statements by representatives of the complainants, we are of the view that in the present circumstances we would not change or vary the assignment made by the complainant employer at this stage in the proceedings. The Board's jurisprudence on interim orders has, since the inception of what is now section 91, been basically that the assignment of the employer will be continued unless that assignment is patently wrong. In the present case, the assignment made by the complainant Lummus was as a consequence of representations by representatives of both the respondent trade unions competing for the work in question. That assignment, having been made in the face of these representations, we are not prepared at this stage to vary that assignment.

6. Accordingly, the Board directs that the complainant, Lummus Canada Inc., shall continue to assign the off-loading (otherwise known as "power rigging") of exchangers, pumps, vessels, package units, skid units and other piping equipment to members of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 463.

7. Counsel for the Ironworkers Local 721, having given an undertaking that Local 721 will comply with this interim order, it is not necessary to proceed with the application for a cease and desist direction at this time.

8. The Registrar is directed to list this matter for pre-hearing conference. The attention of the parties is directed to Board's Practice Note No. 15 with respect to jurisdictional disputes complaints.

2524-81-R; 0144-82-M Toronto-Central Ontario Building and Construction Trades Council (formerly known as The Building and Construction Trades Council of Toronto and Vicinity) on its own behalf and on behalf of its affiliate, The International Brotherhood of Painters and Allied Trades District Council #46, Applicant, v. **M. J. Guthrie Construction Limited**, Rosedale Construction, Respondent

Construction Industry – Construction Industry Grievance – Related Employer – Two related companies co-existing for over twenty years – One operating as general contractor other as sub-contractor – Latter doing some general contract work after former phased out – Board not giving weight to delay in filing related employer application in circumstances – Only provincial agreement may exist in ICI sector – Board dismissing grievance based on working agreement

BEFORE: Ian Springate, Vice-Chairman, and Board Members W. Gibson and M. Ross.

APPEARANCES: *Michael Edwin Lloyd and Alex J. Ahee for the applicant; Brian P. Smeenk and M. J. Guthrie for the respondents.*

DECISION OF THE BOARD; September 27, 1982

1. File No. 2524-81-R is an application under section 1(4) of the *Labour Relations Act*. File No. 0144-82-M is a referral of a grievance to the Board pursuant to section 124 of the Act. The two matters were heard separately by the Board, but because of the common background involved are being dealt with by way of a single decision. It should be noted that the section 1(4) application was filed by the Toronto-Central Ontario Building and Construction Trades Council on its own behalf and on behalf of the International Brotherhood of Painters and Allied Trades District Council #46, 'whereas the 124 referral was made on behalf of the Council and on behalf of seven of the Council's affiliates.

2. M. J. Guthrie Construction Limited ("Guthrie") was incorporated on April 30, 1958. Since the time of its incorporation the company has continuously been controlled and directed by Mr. M. J. Guthrie. On March 2, 1960 Mr. Guthrie registered the name of Rosedale Construction Company ("Rosedale") as the name under which he in his personal capacity would be carrying on business. Eight days later, on March 10, 1960, Mr. Guthrie on behalf of Guthrie, signed a "working agreement" with the Building and Construction Trades Council of Toronto and Vicinity, a non-certified council of building trades unions. The working agreement provided as follows:

PURPOSE

1. The general purpose of this agreement is to establish mutually satisfactory relations between the Company and its employees; to eliminate unfair practices; to establish and maintain satisfactory working conditions, hours of work and wages and to stabilize and encourage the construction industry.

RECOGNITION

2. The Company recognizes the Council and its affiliated unions as the collective bargaining agency for all its employees.
3. The Company agrees that it will employ only members of the unions affiliated with the Council and will let contracts or sub-contracts only to individuals or companies whose employees are members in good standing in the unions affiliated with the Council and will do all things necessary to insure that only members of the unions affiliated with the Council are employed in construction work in which the Company is engaged.
4. The Council through its affiliated unions will supply competent workmen to do the work of any trade or calling that may be required by the Company in the trades represented by the Council.

WAGES, HOURS AND WORKING CONDITIONS

5. The Company agrees to recognize and be bound by the agreements existing between each of the unions affiliated with the Council and the Toronto Builders' Exchange and specifically agrees that the provisions relating to wages, hours and working conditions set forth in the said agreements shall be binding on the company. In the event any of the said conditions of any of the said agreements are altered or amended at any time during the currency of this agreement, the Company shall be bound by such alterations and amendments. The said agreements are available for inspection by the Company at the office of the Council at 67 Harbord Street; at the Toronto Builders' Exchange, 1104 Bay Street, Toronto; and at the Department of Labour, Parliament Buildings, Toronto. The Council shall notify the Company of any amendments or alterations of the said agreements.

TERMINATION

6. This agreement shall remain in force for a period of one year from the date hereof and shall continue in force from year to year thereafter unless in any year not less than sixty days before the date of its termination, either party shall furnish the other with notice of termination of, or proposed revision of, this agreement: PROVIDED, however, that this agreement shall remain in full force and effect until completion of all jobs that have been commenced during the operation of this agreement.

3. It is clear that subsequent to the signing of the working agreement Guthrie regarded itself as a unionized contractor. Although no direct evidence was led on this point, we gather that Guthrie never sought to terminate the working agreement pursuant

to paragraph 6 of the document, and further that the company adhered both to the terms of agreements with the Toronto Builders' Exchange and, after that body ceased to exist, by the terms of collective agreements negotiated between affiliates of the Building and Construction Trades Council of Toronto and Vicinity and other employers' associations.

4. For ease of reference, both the Building and Construction Trades Council of Toronto and Vicinity and a later council known as the Toronto-Central Ontario Building and Construction Trades Council will henceforth generally be referred to simply as "the Building Trades Council". It appears that all of the unions which were affiliated to the Building and Construction Trades Council of Toronto and Vicinity are currently affiliates of the Toronto-Central Ontario Building and Construction Trades Council.

5. From the time of its incorporation, Guthrie operated as a general contractor in the industrial, commercial and insitutional sector of the construction industry in the Toronto area. The firm was particularly active in school construction. The average value of its contracts was in the \$80,000 to \$90,000 range, although it did at least one job valued at about \$150,000. About 90 per cent of Guthrie's work was subcontracted to specialty firms employing members of unions affiliated to the Building Trades Council. The remaining ten per cent of the work was performed by construction labourers and carpenters in the direct employ of Guthrie. The labourers were members of the Labourers International Union of North America, Local 506 while the carpenters were members of one of the locals of the United Brotherhood of Carpenters and Joiners of America. Both of these unions were affiliates of the Building Trades Council. For its part, Rosedale acted primarily as a subcontractor performing work on ceilings, floors, drywall and concrete on residential jobs as well as on some schools. Rosedale hired non-unionized men for its projects. Mr. Guthrie described the work that they performed as essentially "labouring-type" work. The average value of contracts performed by Rosedale was about \$30,000, with the maximum being about \$50,000. Mr. Guthrie testified that the Scarborough Board of Education was Rosedale's biggest customer. Presumably on these jobs the school board was acting as its own general contractor. It is of some interest to note that at times Guthrie acted as a general contractor for the Scarborough Board of Education. Mr. Guthrie gave conflicting testimony as to whether or not Rosedale had ever bid on jobs as a general contractor. At one point he testified that Rosedale had never bid as a general contractor, while later he testified that while it had bid as a general, its bids had never been accepted. Whatever the truth, it is clear that, at a minimum, on a number of occasions Rosedale obtained the documents necessary to prepare bids as a general contractor and accordingly was reported as a bidder in the Daily Commercial News.

6. Rosedale and Guthrie have always operated out of the same office in Scarborough. A single phone number was used for both companies. Until fairly recently the number was listed only under the Guthrie name. The firms shared a truck, with no name printed on it, as well as certain equipment bearing the Guthrie name.

7. Over the years the Building Trades Council's contact with Guthrie was limited to ensuring that the council's records reflected the firm's correct address and phone number. The evidence is that the Building Trades Council became aware of the existence of Rosedale from various reports in the Daily Commercial News indicating that Rosedale had placed bids as a general contractor. In accordance with its practice,

the Council would have written to either the owner or the architect of the project to request that the contract not be awarded to Rosedale but instead to a unionized bidder. In that the Daily Commercial News never reported that Rosedale had been awarded a contract as a general contractor, the Building Trades Council took no other action with respect to Rosedale. We are satisfied that until the events giving rise to these proceedings officials of the Building Trades Council were not aware of any link between Guthrie and Rosedale. If someone from the council had thought to look, he would have noticed that the Council's records for Guthrie and Rosedale showed that both firms had the same mailing address. However, no one thought to do such a check. This is understandable given the number of firms in the construction industry, and the lack of anything to indicate to officials of the Council that there was any link between Guthrie and Rosedale.

8. Although officials of the Council were not aware of any link between Guthrie and Rosedale, officials of the two unions whose members worked directly for Guthrie were aware of such a link. Mr. Guthrie testified that as far back as some ten or fifteen years ago Mr. D. Davidoff, at the time a representative with Labourers Local 506, sought, and obtained, an assurance from him that no Rosedale men would be employed on a Guthrie project at a school in Markham. Mr. Guthrie also testified that about ten years ago "Charlie" from the carpenters union asked Mr. Guthrie if Rosedale required carpenters, and he was advised that it did not.

9. About mid-1981 Mr. Guthrie decided to close down the Guthrie firm and continue only with Rosedale. According to Mr. Guthrie he did not intend that Rosedale would become a general contractor, but that it would continue doing "just the same, subcontracting". The phone number used by both companies was put under the Rosedale name. The last contract obtained by Guthrie was in August of 1981 for work to be performed on the St. Williams School in the City of Toronto. The contract was awarded to Guthrie by the Metropolitan Toronto Roman Catholic Separate School Board.

10. In January of 1982 Mr. John Robbins, the business agent of Local 2 of the International Union of Bricklayers and Allied Craftsmen, an affiliate of the Building Trades Council, attended at the St. Williams School job. Mr. Robbins testified, and we accept his testimony over the conflicting testimony of Mr. Guthrie, that Mr. Guthrie advised him that the job was being performed by Rosedale. Mr. Robbins subsequently phoned the School Board and ascertained that the contract had in fact been let to Guthrie. On or about January 23, 1982 Mr. Robbins encountered a bricklayer on the site who did not belong to his union. This prompted Mr. Robbins to file a grievance against Guthrie under the Bricklayers' Provincial Agreement on the basis that Guthrie had failed to employ a member of his local. Guthrie eventually settled the grievance by hiring a member of Local 2 to work on the project and making a cash payment to the local.

11. In cross-examination Mr. Guthrie testified that two non-union painters in the employ of Rosedale were utilized on the St. Williams School site, a move which he said prompted a complaint from the painters union. Presumably the complaint was made by the International Brotherhood of Painters and Allied Trades, District Council 46, an affiliate of the Building Trades Council. It is to be noted that the 1(4) application was filed on behalf of the Painters District Council. Mr. Guthrie also testified that one construction labourer was employed on the project for an hour or so a day, and that this

labourer was an employee of Rosedale. We gather from the above evidence, that none of the direct-hire employees originally assigned to the school jobs were members of unions affiliated to the Building Trades Council.

12. On or about February 1, 1981 Mr. Robbins telephoned the Building Trades Council and told them he felt Guthrie and Rosedale were one and the same. After several tries, Mr. M. Lloyd, a business representative with the Building Trades Council, talked to Mr. Guthrie on the phone. Mr. Guthrie advised him that the Guthrie firm had gone out of business back in August of 1981.

13. On April 12, 1982, the Daily Commercial News reported that Rosedale had placed a bid with the Scarborough Board of Education for an entry vestibule addition. Mr. Guthrie testified that Rosedale was not bidding on the job as a general contractor, since all that was involved was a shell for the entrance to a school. Presumably, Mr. Guthrie meant by this that if Rosedale obtained the work, it would not sub-let any of the work but rather perform it all with its own employees. No evidence was led as to the details of the work involved, but it seems to us that the work likely would have required the involvement of skilled tradesmen such as carpenters and/or bricklayers and was not just the "labouring type" of work normally performed by Rosedale's own employees. No detailed evidence was led concerning any other bids placed, or work obtained, by Rosedale since the decision was made to discontinue Guthrie.

14. After the events set out above, the Building Trades Council directed a corporate search of Guthrie and Rosedale. Initially no trace could be found of Rosedale, due to the fact that it had been "de-registered" in 1975 since no filings had been made subsequent to its original registration in March of 1960. A copy of the original registration was however eventually obtained from the Ontario Archives. Once the copy had been obtained, the section 1(4) application was filed.

15. Section 1(4) provides as follows:

Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

16. At the hearing, counsel for Guthrie and Rosedale conceded that the statutory preconditions existed in this case for the Board to apply section 1(4) and treat the two companies as a single employer. Nevertheless, he contended, the Board should exercise its discretion and decline to do so because of the twenty-one year delay since the time that the two operations had started to exist side by side. Undue delay in bringing an application is one of the factors which the Board takes into account when deciding whether or not to exercise its discretion and made a declaration under section 1(4). In a

number of cases the Board has concluded that because of the length of time in which a union has accepted the existence of related unionized and non-unionized employers it would be inappropriate to make a declaration that the two should now be treated as a single employer. for example, *Farquhar Construction Limited*, [1978] OLRB Rep. Oct. 914. Given the facts of this case, if Mr. Guthrie had continued to operate Guthrie and Rosedale in the same manner as he had been doing for the previous twenty-odd years, we would likely not be prepared to take any action which might alter the existing arrangement. However, Mr. Guthrie himself altered the status-quo by phasing out the Guthrie firm. The evidence also indicates that Rosedale had begun to perform at least some of the same type of work which previously had been performed by Guthrie. Indeed, even though the contract for the St. Williams School project was let to Guthrie, Mr. Guthrie not only held out that the work was being done by Rosedale, but in fact Rosedale employees including Rosedale painters were employed on the job.

17. The Board has stated that one of the purposes of section 1(4) is to prevent existing bargaining rights from being eroded by the devise of directing work away from a unionized firm to a related non-unionized firm. See: *Evans-Kennedy Construction Limited*, [1978] OLRB Rep. May 388. The evidence before us indicates an intent on the part of Mr. Guthrie to have Rosedale perform at least certain of the types of work formerly performed by Guthrie. We are satisfied that the effect of this will be to erode any bargaining rights held with respect to Guthrie. Such an erosion could be protected against by a declaration under section 1(4) which would have the effect of putting Rosedale in the same position as Guthrie in so far as the Building Trades Council and the International Brotherhood of Painters and Allied Trades District Council #46 are concerned. However, to the extent that Rosedale continues to perform some of the same work as before, a section 1(4) declaration might also serve to extend bargaining rights to cover work formerly performed by Rosedale on a non-union basis. In the past Board has declined to make a section 1(4) declaration where it would result in an extension of bargaining rights. Before us then is the issue as to whether the Board's concerns about not extending bargaining rights should override the need to protect any existing bargaining rights from being eroded. As already noted, had Mr. Guthrie left untouched the relationship between Guthrie and Rosedale, the Board would likely have refused to make any section 1(4) declaration. However, Mr. Guthrie altered the existing situation and he did so in such a way that if left unchecked, the result will be the complete elimination of any relevant bargaining rights. Mr. Guthrie having taken this step, we feel it is appropriate for the Board to take action to protect whatever rights the International Brotherhood of Painters and Allied District Trades Council #46 and the Building Trades Council might have, notwithstanding that the effect of doing so might be to unintentionally expand existing bargaining rights.

18. Having regard to the above, with respect to the International Brotherhood of Painters and Allied Trades District Council #46, the Board will treat M. J. Guthrie Construction Limited and Rosedale Construction, being the style under which Mr. M. J. Guthrie carries on business, as constituting one employer for the purposes of the *Labour Relations Act*. The Board further declares that Mr. M. J. Guthrie carrying on business as Rosedale Construction is bound to whatever bargaining rights exist between Guthrie and District Council #46. We would note that we make no finding in these proceedings as to what, if any, bargaining rights are in fact affected by this declaration. The evidence before us suggests that Guthrie did not employ any painters either at the

time that the working agreement was entered into or anytime thereafter. This being the case there arises a question of whether the working agreement could have created any legally enforceable bargaining rights under the *Labour Relations Act* with respect to either District Council #46 or any of its constituent members. The parties themselves did not address this issue at the hearing, and accordingly, we propose not to comment on it any further.

19. As indicated above, the Board is satisfied that the rights of The Building Trades Council insofar as they relate to Guthrie should also apply to Rosedale. At the hearing the parties did not really address the issue as to what rights the working agreement may have created vis-à-vis Guthrie and the Building and Construction Trades Council of Toronto and Vicinity. In these circumstances and given the importance of this issue, we feel it unwise to reach any conclusions on the matter in the context of these proceedings. At the hearing the parties did deal at some length with the issue of the relationship between the Building and Construction Trades Council of Toronto and Vicinity and the Toronto-Central Ontario Building and Construction Trades Council. The evidence leads us to conclude that the Toronto-Central Ontario Building and Construction Trades Council was chartered on July 1, 1979 by the Building and Construction Trades Department of the American Federation of Labor and Congress of Industrial Organizations and that it was assigned the jurisdiction of three existing councils, including the Building and Construction Trades Council of Toronto and Vicinity. In these circumstances, we are satisfied and so declare that the Toronto-Central Ontario Building and Construction Trades Council stands in the same position vis-a-vis Guthrie as did the Building and Construction Trades Council of Toronto and Vicinity. The Board also declares that with respect to the Toronto-Central Ontario Building and Construction Trades Council acting on its own behalf, the Board will treat M. J. Guthrie Construction Limited and Rosedale Construction, being the style under which Mr. M. J. Guthrie carries on business, as constituting one employer for the purposes of the *Labour Relations Act*.

20. We turn now to consider the referral of the grievance in File No. 0144-82-M. The referral was filed on behalf of the Building Trades Council and seven of its affiliates. The grievance alleges a violation of the working agreement on the St. Williams School project. Having regard to the provincial bargaining sections of the Act, we are satisfied that with respect to the industrial, commercial and institutional sector of the construction industry (which includes school construction) as of April 30, 1978, Guthrie could have been bound only by the provisions of the provincial agreements sanctioned under the Act. This is made clear by section 146 which provides, in part, as follows:

146.-(1) An employee bargaining agency and an employer bargaining agency shall make only one provincial agreement for each provincial unit that it represents.

(2) On and after the 30th day of April, 1978 and subject to sections 139 and 145, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers'

organizations or employer bargaining agency shall bargain for, attempt to bargain for, or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void.

It follows from the above that on the St. Williams School project, the working agreement could not have had any force or effect either as a collective agreement or as some other type of enforceable arrangement. There is no grievance before us alleging that Guthrie has violated any of the provincial agreements. This being the case, since this matter does not involve a referral of a grievance arising under a valid collective agreement, it can not be the proper subject matter of a referral under section 124.

21. The grievance is accordingly dismissed.

0090-82-U Michael Shaw, Applicant, v. International Union of Elevator Constructors, Local 50 and William Morran, Respondent

Duty of Fair Referral – Unfair Labour Practice – Union refusing to assign complainant to work through hiring hall – Refusal based on adverse evaluation by employer – Union accepting employer's evaluation which lacked specificity without investigation – Union's conduct arbitrary and contravening duty of fair referral

BEFORE: D. E. Franks, Vice-Chairman.

APPEARANCES: *Ernest C. Shaw and Michael Shaw for the applicant; Maurice A. Green and William Morran for the respondent.*

DECISION OF THE BOARD; September 23, 1982

1. This is a complaint under section 89 of the Act wherein the complainant alleges that he was dealt with by the respondents contrary to section 69 of the Act in the assignment to employment out of the union's hiring hall. Simply put, the facts are that since being laid off in October, 1981, the respondent, Mr. Morran has refused to send the complainant, Michael Shaw, on any assignments through its hiring hall.

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3. At the time of his lay-off, Mr. Michael Shaw was classified as a Probationary Helper II under the provincial agreement between the National Elevator and Escalator Association and the International Union of Elevator Constructors (Clause 10.03.02) by

virtue of his having completed six months in the industry. Mr. Shaw's work record on his card from the union hiring hall is as follows:

"Company	Started	Terminated	Remarks
Montg.	Oct. 6/80	Nov. 21/80	laid off
Otis	Dec. 5/80	Jan 15/81	laid off
Penn	Mar. 6/81	Apr. 3/81	laid off
Armor	May 4/81	June 25/81	laid off
Beckett	June 26/81	Oct. 9/81	laid off"

Shortly after Mr. Shaw's lay-off, Mr. Morran the business manager of Local 50 received the following letter dated October 6, 1981 from Beckett Elevator:

"It is the recommendation of Beckett Elevator that M. Shaw be thoroughly reviewed prior to becoming a member of Local 50.

We have discussed M. Shaw's working ability and skills with various of our Field Mechanics and it is our opinion that M. Shaw is not suited for this type of work.

We hope that the I.U.E.C. will take an active role in assisting M. Shaw to find work more suitable to himself."

4. The evidence of Mr. Morran is that in view of the letter from Beckett Elevator and from certain other verbal complaints that had been made about Mr. Shaw's work performance in the past, he was not going to send Mr. Shaw out because he would not be a suitable "employee" in the elevator industry. Mr. Morran pointed out that under the collective agreement there is a twelve month probationary period and that through the hiring hall, unsatisfactory employees could be sent from employer to employer until their probationary period was completed and then it would be next to impossible to get them "out of the industry".

5. Mr. Morran's evidence also indicates that currently recruiting for the membership in the union is done on the basis of aptitude tests, but at the time Mr. Shaw was brought into the industry no such aptitude tests were in force. Further, the evidence is that a number of other employees starting in the industry have been treated in a similar manner to Mr. Shaw. Thus, Morran's evidence is that any complaints about new employees by employers are disregarded unless a letter is sent to the union office and the employee, stating the reason for the unsatisfactory work report. Indeed, Mr. Morran filed documents with respect to some six other probationary employees in a similar position to Mr. Shaw. A perusal of these documents is extremely informative. In some cases, the letter by the employer to the union was extremely specific, stating the times and dates on which, for instance, the probationary employee did not report to work, or reported to work late as a consequence of which he was terminated. Others deal with very specific employee evaluations which indicate that the opinion by the fellow employees was that the helper's work was poor and that he shouldn't remain in the industry. What is of some concern when one compares these reports with that filed by the Beckett Company in the present case, is that the letter from Beckett quoted above does not refer to any specific incident on which the conclusion reached therein is based.

6. The difficulty with such a letter was amply illustrated in the evidence presented to the Board. It appears that Mr. Shaw was not notified of the effect of the letter from Beckett until some time in the new year. Beckett, it seems, sent the letter to the union but not to Mr. Shaw. Indeed the significance of the letter was not brought home to Mr. Shaw until sometime in February of 1982. It appears that Mr. Shaw was attending a community college course as part of the requirements for being a helper in the elevator industry and it was drawn to his attention by one of his classmates that he would not be sent out by the union for any future jobs. When questioned about the significance of the letter from Beckett, he simply thought, that in his words "he would have difficulty getting a job working for Beckett in the future".

7. It appears, however, that Mr. Shaw's father, a member of Local 50 took up the fight on his son's behalf, as a consequence of which Mr. Morran followed up on the two previous complaints about Michael Shaw's employment. One of these complaints was from Armour Elevator, the other from Otis Elevator. Both these companies in turn sent letters to Mr. Morran in mid February. No evidence was called concerning the Otis letter, but Mr. Deveau from the Armour Elevator Company did give evidence. It turns out that the incident on which his letter was based was one which even he admitted was not sufficient to conclude that a person did not have the potential to be a mechanic in the elevator industry. As pointed out above, this is the basic concern with a letter of the type sent by Beckett to Morran. It is so general and lacking in specifics that it amounts to nothing more than a general allegation concerning Mr. Shaw as an employee.

8. One further bit of evidence should be noted. One of the witnesses for the respondent trade union was in fact the president of the local union. His evidence is that Mr. Shaw had worked for him at Penn Elevator and that there had been nothing wrong with his work performance at that time.

9. As noted above, Mr. Shaw was a probationary helper under clause 10.03.02 of the collective agreement. That clause reads as follows:

"Probationary Helper II:

Upon completion of six (6) months in the industry, to the satisfaction of the Employer and the Union, a Probationary Helper shall be re-classified as a Probationary Helper II. For further advancement in the industry, he shall be obligated to successfully complete the recognized courses of training as designated by the local area committee under the direction of the National Board of Trustees of the C.E.I.E.P., if available.

He shall receive 60% of the Mechanic's rate and shall be entitled and be required to participate in and make contributions to the Welfare Plan and Pension Plan as provided for in this Agreement. He shall also be entitled to enroll in the Canadian Elevator Industry Educational Program. The Trustees of the Plans and the Program shall be requested to make any and all amendments or arrangements necessary to accomplish this.

The Employer and the Union shall have the privilege of testing the ability of a probationary employee during this twelve (12) month period. If they agree that the employee during this probationary period does not display sufficient aptitude to become a Helper he shall be discharged. No such discharge shall be construed as a grievance by either party."

Further, Mr. Shaw was paying dues to Local 50 at the time in question. The issue which arises before this Board is whether Mr. Morran's treatment of Mr. Shaw constitutes conduct that is arbitrary or discriminatory or in bad faith in refusing to send him out to future employment. We note that the collective agreement in question refers to "the employer and the union shall have the privilege of *testing* the ability of a probationary employee during this twelve (12) month period". It is clear on the facts that no testing was indeed performed. Mr. Morran was content to take the evaluations of the employers without question. It is the view of this Board that such acceptance of the employer's evaluation, such as Beckett Elevator's in the present case, without question, constitutes arbitrary conduct within the meaning of section 69 of the Act. The evidence is that Mr. Morran did not investigate or even question this evaluation by Beckett, but simply accepted it as grounds for refusing to further assign Mr. Shaw to work.

10. This is not to take away from Mr. Morran's concern about supplying competent and capable and energetic workmen through the union hiring hall. Clearly, his concern to weed out employees who are, for instance, regularly late for work or regularly fail to report for work is no doubt a justifiable concern, and indeed, does not, if properly done, constitute a violation of section 69 of the Act. Thus, for instance, in the examples cited above concerning other employees there are letters from employers to the union referring to specific dates and absences. Mr. Morran in these circumstances can discuss this with the individuals involved and if uncontested, accept them as grounds for a subsequent refusal to refer such unconscientious employees to employment or to the hiring hall. However, there is no evidence that this was done in the present case, and indeed, it appears from the evidence that it should have been done in order to verify whether Beckett's conclusion about Shaw's job performance was in fact accurate.

11. The relief requested by the complainant in the present matter is simply a request to be sent out from the hiring hall. The relief requested does not extend to any request for damages or any other consequential relief, and this Board is of the view that the relief sought is appropriate in the present case. The respondent trade union, through its business manager, Mr. Morran, is therefore directed to assign Mr. Michael Shaw to employment as a Probationary Helper II out of the union's hiring hall forthwith.

0710-82-M The Master Insulators' Association of Ontario Inc. and **Misco Insulation Company Limited**, Applicant, v. International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, Respondent

Arbitration – Construction Industry Grievance – Practice and Procedure – Events giving rise to grievance occurring during currency of collective agreement – Referral to Board made after expiry of agreement – Whether applicant party to collective agreement eligible to resort to section 124

BEFORE: E. N. Davis, Vice-Chairman, and Board Members S. Cooke and W. Gibson.

APPEARANCES: *J. Forbes-Roberts, K. Labelle and R. Kirky for the applicant; M. Zigler and B. McQueen for the respondent.*

DECISION OF THE BOARD; September 17, 1982

1. This is a referral of a grievance pursuant of section 124 of the Act. Misco Insulation Company Limited was bound to a provincial collective agreement with the respondent which expired April 30, 1982, and a "no Board" report was issued by the Minister on May 25, 1982. The circumstances giving rise to the grievance are alleged to have occurred on January 12, 1982, and a grievance dated July 6, 1982, was delivered to the respondent union on July 7, 1982. This referral to the Board was made on July 9. The respondent made the preliminary objection to the jurisdiction of this Board to entertain the referral and based on its objection on the grounds that the grievance itself was a nullity, and that, in any event, the collective agreement having expired, Misco is no longer a party to a collective agreement which precludes the operation of section 124 of the Act. In respect to this latter argument, the respondent relies on the reasoning expressed in the arbitration decision *Milltronics Ltd.*, 30 LAC 393.

2. The grievance procedure included in the expired collective agreement between the parties reads as follows:

"6.01

Where a grievance, complaint or dispute arises, between an employer or employers and any employee or employees, or employers and the Union, regarding the interpretation, application or administration of this Agreement, including any question as to whether a matter is arbitratable or where an allegation is made that this Agreement has been violated, such grievance, complaint or dispute shall be dealt with as described in the following paragraphs of this Article.

6.02

STEP NO. 1: By negotiations between the Union Stewards and/or the Union Business Representative and the appropriate foreman, directly in charge of the work, acting for the Employer. If the grievance is not settled at this step, the Grievor may institute action under the O.L.R.A. Ref. Article 112A..

6.03

STEP NO. 2: "112A" – (1) Notwithstanding the grievance and arbitration provisions in the collective agreement or deemed to be included in a collective agreement under section 37, either party to a collective agreement between an employer or employers' organization and a trade union or council of trade unions may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable, to the Board for final and binding determination.

(2) A referral under subsection 1 may be made in writing in the prescribed form by the party at any time after delivery of the written grievance to the other party, and the Board shall appoint a date for and hold a hearing within fourteen (14) days after receipt of the referral and may appoint a labour relations officer to confer with the parties and endeavour to effect a settlement before the hearing.

(3) Upon a referral under subsection 1, the Board has exclusive jurisdiction to hear and determine the difference or allegation raised in the grievances referred to it, including any question as to whether the matter is arbitrable, and the provisions of subsections 5a, 7, 8, 9, 10, and 11 of section 37 apply mutatis mutandis to the Board and to the enforcement of the decision of the Board.

(4) The expense of proceedings under this section, in the amount fixed by the regulations, shall be jointly paid by the parties to the Board for payment into the Consolidated Revenue Fund 1975, c. 76, s. 30."

6.04

The parties agree that any application under Section 112A must be filed with the Registrar of The Ontario Labour Relations Board within one hundred and eighty days (180 days) immediately following the date of the happening of the event giving rise to the grievance, complaint or dispute, failing which the parties agree that they will be deemed to have abandoned such grievance, complaint or dispute will be stopped from relying upon the provisions of Section 112A. In the case of a grievance, complaint or dispute arising out of a continuing matter, the parties agree that they will be stopped from claiming damages for or monetary adjustment by reason of anything which happened prior to the one hundred and eighty (180) day period immediately proceeding the filing of the application under Section 112A. Section 37(5a) of the Labour Relations Act does not apply to this Agreement."

It is noted that, apart from Article 6.04, the language is substantially a verbatim copy of what was then section 112a of the Act (now section 124).

3. Counsel for Misco argued that the arbitral principle is well established that where the events giving rise to the grievance occur within the terms of the collective agreement and where the grievance is filed within the mandatory time limits of that agreement then a Board of Arbitration is seized of the matter. Counsel referred us to the cases of *Re Truck Crane Service* 4 LAC (2d) 250; *Re Hamilton Civic Hospital* 30 LAC (2d) 112; and *Re Corporation of the Township of Muskoka* 1 LAC (3d) 125, and argued that the facts of the present case fall well within the reasoning expressed in those cited cases.

4. The initial question to be dealt with by the Board is not whether the grievance itself is arbitrable but whether that matter may be properly determined by this Board pursuant to section 124 of the Act. The purpose of this section is to provide a speedy and expeditious final and binding determination of contract disputes arising in the construction industry, and access to the section is available at the election of either party. The exercise of that election pre-empts any other mutually agreed upon arbitration machinery existing in the collective agreement. Thus section 124(1) provides:

124.-(1) Notwithstanding the grievance and arbitration provisions in a collective agreement or deemed to be included in a collective agreement under section 44, a party to a collective agreement between an employer or employers' organization and a trade union or council of trade unions may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable, to the Board for final and binding determination. 1975, c. 76, s. 30, part; 1977, c. 31, s. 2.

In the instant case, the collective agreement which did exist between the parties contained a provision that adopted the process of referral of section 124 as the sole method for the final and binding determination of all contract disputes arising between them. This Board's jurisdiction however cannot be affected in this regard by the private agreement of the parties. The Board's jurisdiction flows from the statute and the Board must satisfy itself that it is acting within the authority conferred upon it by the Legislature.

5. The case of *Milltronics Ltd.*, *supra*, raised a similar issue to that now before us. That case involved an application under section 37a of the Act (now section 45) made at a time subsequent to the expiry of the collective agreement but while the terms of section 70(1) of the Act (now section 79(1)) continued to be operative. Section 37a (now section 45), in language similar to that of section 124(1) accords access to the section for "a party to a collective agreement". The arbitrator concluded that at the time of the request the union was no longer "a party to a collective agreement" and therefore had no right to make the request, although it is suggested that had the arbitration provisions of the collective agreement been invoked rather than a section 37a request, the matter might well have been found to be arbitrable in that form.

6. The Board's decision in *Sinclair Welding Limited*, [1980] OLRB Rep. March 343 canvasses arbitral jurisprudence in respect to the right to have a contractual dispute

arbitrated subsequent to the expiry of the collective agreement under which the dispute arose. In that case the Board quoted, with approval, the previous decision of the Board in *Genstar Chemical Limited*, [1978] OLRB Rep. Sept. 835, and determined that it should deal with the grievance arising out of an expired collective agreement. In the instant case, in our view, the grievance in which these proceedings are founded was rooted in events occurring on January 12th, 1982 at which time the collective agreement was operative and the grievance itself, while filed considerably later, was filed within the time limits provided for in that agreement. Those circumstances fall well within the reasoning of the Board of Arbitration in the case of *Re Truck Crane Ltd.*, 4 L.A.C. (2d) 250, and which we adopt. That Board said, in part,

“The right to file a grievance for a breach of the collective agreement which takes place during the eleventh hour of the operation of a collective agreement is not extinguished until after the expiration of any mandatory time limits referred to in the grievance procedure of the collective agreement...”

The question before us then becomes one of whether the Board is precluded from entertaining a referral to arbitration under section 124 of the Act where such referral is made after the expiry of a collective agreement. The union argued that the words “a party to a collective agreement” in the section must be interpreted to mean, in effect, “a party to an existing collective agreement”.... The company argued that it, as the referring party, was a party to a collective agreement at the time at which the right claimed had crystallized or vested and was thus arbitrable by this Board in the same manner as similar matters are arbitrable before a tribunal constituted by the collective agreement itself.

7. In the *Genstar* case, *supra*, it was concluded that,

“Our conclusion is that the policy mandated by section 37 [now section 44] of the Act requires that all grievances which relate to events arising during the term of a collective agreement may be submitted to arbitration, even though the grievance is not filed until after the collective agreement has expired.”

The reasoning of the Board in the *Genstar* case is, in our view, applicable to the case before us. In the case before us the actual filing of the grievance was subsequent to the date when the statutory “freeze” had ceased to be operative. However the critical considerations have to be that the grievance is founded in an incident occurring during the existence of the collective agreement and that it is filed within the mandatory time limits provided by that collective agreement, both of which circumstances are met in the instant case.

8. The language of section 124 must be read in the light of the general policy background of the Act. The use of the words “a party to a collective agreement” does not have to be read as meaning “a party to an agreement existing at the time of referral” as is argued by the union. To give it that restricted reading is to ignore the fact that vested rights arose under a collective agreement to which the union was a party and the purpose of the statute as outlined in *Genstar*, *supra*, is to provide for the final and

binding settlement of such disputes. It is in that sense that the words must be interpreted.

9. In addition to the *Milltronics* arbitral award to which we are referred and dealing with similar language under section 45 of the Act, there is the unreported decision of J. D. O'Shea, Q.C. sitting as a sole arbitrator appointed under section 37a [now section 45] in which he came to an opposite conclusion than that of the *Milltronics* case. Mr. O'Shea in the case of *St. Joseph's Health Centre* (1981) was dealing with the interpretation of these words in the case of a request filed after the expiry of the collective agreement and while there was a "freeze" under the *Hospital Labour Disputes Arbitration Act*. He there said, in part,

"I further find that even though the collective agreement had expired before the request was made under section 37a of the *Labour Relations Act*, the union continued to be a "party" for the purposes of section 37a. Under Article 10 of the *Hospital Labour Disputes Arbitration Act*, the rights, privileges etc. which are continued in effect are continued not only for employees, but for the employer and trade union as well, until such time as the right of the trade union to represent the employees has been terminated. Since there was no evidence that the union's right to represent the employees was terminated, I find that the Union's right as a "party" under the expired collective agreement, continued, and that the Union could therefore give effect to that right by making a request for the appointment of an arbitrator under section 37a of the *Labour Relations Act*".

We agree with that reasoning and would not differentiate in the interpretation of the words "a party to a collective agreement" merely because the referral is not made until after the expiry of the statutory freeze. The fact is that the dispute arose out of an existing contract and it is the settlement of that dispute of which the applicant is seeking to have a final and binding settlement.

10. The Board therefore concludes that it will entertain this referral and the matter is referred to the Registrar for listing for further hearing.

0488-82-R Rapid Ready-Mix Limited, Applicant, v. International Union of Operating Engineers, Local 793, respondents

Termination – Union certified by Board – Employer shutting operation and laying off all employees for winter – Union's notice to bargain sufficient in circumstances – Union not abandoned nor slept on bargaining rights – Termination application dismissed

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members F. W. Murray and H. Korbyn.

APPEARANCES: *C. B. Noble, Q.C., Jack O'Neill and Gerry Hill for the applicant; J. Redshaw and G. Palanuk for the respondent.*

DECISION OF THE BOARD: September 15, 1982

1. This is an application for termination of bargaining rights made under section 59 of the *Labour Relations Act*. That action reads as follows:

59.-(1) If a trade union fails to give the employer notice under section 14 within sixty days following certification or if it fails to give notice under section 53 and no such notice is given by the employer, the Board may, upon the application of the employer or any of the employees in the bargaining unit, and with or without a representation vote, declare that the trade union no longer represents the employees in the bargaining unit.

(2) Where a trade union that has given notice under section 14 or section 53 or that has received notice under section 53 fails to commence to bargain within sixty days from the giving of the notice or, after having commenced to bargain but before the Minister has appointed a conciliation officer or mediator, allows a period of sixty days to elapse during which it has not sought to bargain, the Board may, upon the application of the employer or of any of the employees in the bargaining unit and with or without a representation vote, declare that the trade union no longer represents the employees in the bargaining unit.

2. The applicant employer runs a ready-mix concrete business in the Sault Ste. Marie area. The respondent trade union is the bargaining agent for the company's employees by virtue of two certificates issued on September 30, 1981 and covering the company's operations in Sault Ste. Marie itself, and a second operation about sixty miles away at Sowerby, Ontario. On October 21, 1981, following receipt of these certificates, the union sent the company the following letter:

Dear Sirs:

This is to advise you that we have been issued Certificates covering all employees at and out of Sowerby, Ontario and at and out of Sault Ste. Marie, Ontario, save and except foremen, those above the rank of foreman, office and clerical staff.

We understand that our Area Representative, Mr. G. Palanuk, has been in touch with you and a meeting has been scheduled.

3. Mr. George Palanuk, the union's area representative, could not recall whether he had contacted the company prior to October 21st as the letter suggests, but, in any event, the parties met on or about November 6, 1981 for the purpose of collective bargaining. At that meeting the union initially sought to deal with both locations, however, the company refused to bargain about the Sault Ste. Marie operation until a collective agreement had been concluded for Sowerby. While the union was not happy about it, no challenge was taken and the negotiations proceeded on that basis.

4. Subsequent collective bargaining focused almost exclusively on the Sowerby agreement. The situation at the Sault Ste. Marie location surfaced only peripherally – as, for example, when there was a discussion about the transfer of employees and seniority rights from one location to another, or when there was a question concerning the standardization of benefits for both employee groups. In the case of the benefit package, the company was reluctant to accept the union-sponsored scheme, and undertook to explore the matter with an insurance company and advise the union in May or June of 1982 about the details of a package to be applied to both locations. On one occasion, an employee from the Sault Ste. Marie location attended bargaining and, it appears, there was some communication between the union and the employee complement as a whole. In general, however, the union was content to proceed as the company had suggested, dealing, initially, only with the Sowerby location and leaving the Sault Ste. Marie operation for later. Negotiations were concluded in early December and a collective agreement was formally executed on or about December 22, 1982.

5. Meanwhile, as winter approached and the construction business declined, so did the demand for ready-mix concrete products in Sault Ste. Marie. By the time the Sowerby collective agreement had been executed, all of the employees at the Sault Ste. Marie plant had been laid off. Any bargaining which took place at that stage would be largely academic for there were no employees to which any resulting collective agreement could then apply. Indeed, Jack O'Neill, the consultant hired by the company to conduct its negotiations, told the Board that, as far as he knew, his retainer was at an end with the completion of the Sowerby agreement. He was paid for his services and on December 26, 1981, went on holiday for several months. He had no instructions to pursue negotiations in respect of the Sault Ste. Marie location.

6. In mid-January, George Palanuk telephoned Gerald Hill, the President of the company, to discuss the situation. Eventually arrangements were made to meet on February 1, 1982. A letter confirming that meeting was sent to the company on or about January 25, 1982:

Dear Sir:

Please be advised that this will confirm our meeting scheduled for 11:00 A.M. February 1st., 1982 at your office to continue discussion on completing negotiations regarding Rapid Ready-Mix Limited, Sault Ste. Marie, Plant.

Unfortunately, because of inclement weather, Mr. Hill was unable to attend the

meeting. The union was notified by Hill's secretary that the meeting would have to be cancelled.

7. According to Hill, he was telephoned again by Panaluk in late April with respect to continuing negotiations but, at that time, advised Panaluk that the Sault Ste. Marie operation was still closed, and it was uncertain whether or when it could re-open. Panaluk suggested that Hill write a formal letter to that effect, and defer negotiations until the economic situation of the company was clarified. On May 5, 1982, Panaluk also called O'Neill (who had returned from his vacation by this time) and put the same proposition to him. O'Neill, in turn, spoke to Hill and subsequently advised Panaluk that no such letter would be forthcoming. Nor did the company ever contact the union in respect of the benefit package which was to be applicable to both locations. On May 11, 1982, the employer, by its solicitors, sent the following letter to the Board requesting termination of the union's bargaining rights in respect of the Sault Ste. Marie location:

Dear Sir:

Re: Rapid Ready-Mix Limited and International Union of Operating Engineers, Local 793. Your File No: 1132-81-R

By Board Order dated the 30th day of September, 1981 on the application of International Union of Operating Engineers, Local 793, the Board certified the Local as the bargaining agent of all employees of Rapid Ready-Mix Limited working at and out of Sault Ste. Marie, Ontario, save and except foremen, those above the rank of foreman, office and clerical staff.

I am advised that the trade union failed to give the Employer notice under Section 14 of the Act within 60 days following certification.

In any event, the Employer, due to the pressure of economic conditions general in the community, was required to close the plant at Sault Ste. Marie, Ontario. The plant has been closed for some 3 months. There are no employees at the plant and there is no immediate prospect of re-opening.

On behalf of the Employer please consider this application under Section 59 of the Act for a declaration that the trade union no longer represents the employees in the bargaining unit.

I look forward to your acknowledgement and response.

It will be observed that the letter itself acknowledges that the Sault Ste. Marie plant had been closed for some time, that there were then no employees in the bargaining unit, and that, consequently, any bargaining in respect of Sault Ste. Marie would have been somewhat academic. Nevertheless, the thrust of the employer's position is that the Board should terminate the union's bargaining rights because it has failed to exercise them.

8. Section 59 of the Act gives the Board a discretion to terminate the rights of a trade union that has "slept on its bargaining rights". But that is not what has happened here at all. We find that the letter of October 21, 1981 constituted sufficient notice to bargain in respect of the bargaining units at both Sowerby and Sault Ste. Marie. Certainly that is how the employer took it at the time, and at the first meeting the union did indeed seek to bargain on behalf of both groups of employees. It was the employer which was unprepared to do so. Moreover, it appears to us somewhat inconsistent to suggest, as the employer then did, that bargaining for the Sault Ste. Marie location should be postponed; then to argue, as it now does, that the trade union was not sufficiently diligent in pursuing its bargaining rights.

9. The evidence establishes that there was no particular urgency to pursue bargaining in respect of the Sault Ste. Marie location. There were no employees in the bargaining unit by the time the employer was prepared to negotiate and, as late as the employer's letter of May 11, 1982 constituting the present application it was unclear whether that plant would ever re-open. In the circumstances it is hardly surprising that the union would not press the matter. Nevertheless, the union was not without interest. In January, Palanuk contacted the company and arranged a meeting. When the company's President could not attend, Palanuk sought to arrange another meeting, or to obtain some formal indication (in writing) of what he had been told by Mr. Hill; namely, that the future of the Sault Ste. Marie location remained uncertain. Throughout this period, of course, the company itself made no effort to initiate discussions, and its response to the union's efforts to pursue the matter early in May was the instant application.

10. We are not satisfied that the factual prerequisites for section 59(1) have been made out. In our view, there was a sufficient notice to bargain following certification and the only reason why the bargaining did not proceed in respect of both locations is that the company refused to do so. The union never abandoned its interest in discussing the situation in Sault Ste. Marie. On the contrary, even though there were then no employees in the bargaining unit it contacted the company in January and arranged a formal meeting in February. It may be that one can find a period of sixty days wherein the union did not press for negotiations in respect of the empty Sault Ste. Marie bargaining unit; but that is not the mischief to which section 59 is directed. It is clear, in the circumstances of the present case, that the union has not ignored or abandoned its bargaining rights. In our view, no termination of those bargaining rights would be warranted.

11. For the foregoing reasons, this application is dismissed.

0330-81-JD Toronto Central Ontario Building and Construction Trades Council and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46, Complainants, **Simcoe Mechanical Contracting Limited** and Christian Labour Association of Canada, respondents, v. Mechanical Contractors Association of Toronto, Intervener #1, v. Mechanical Contractors Association of Ontario Intervener #2

Jurisdictional Dispute - Dispute as to assignment of plumbing and pipefitting work to CLAC - Area practice favouring claim by UA - Area practice not determinative - Decision based on area practice having effect of depriving CLAC of bargaining rights throughout province - Dispute more one of representation than jurisdiction - Board not interfering with employer's assignment

BEFORE: R. A. Furness, Vice-Chairman, and Board Members D. B. Archer and J. Wilson.

APPEARANCES: *A. M. Minsky and W. Howard for the complainants; Gary Graham and Janice Rose for Simcoe Mechanical Contracting Limited; Wm. R. Herridge, Q.C., Elizabeth Forster, Kerry Lee and Edward Vanderkloet for the Christian Labour Association of Canada; G. Grossman and R. A. Werry for interveners #1 and # 2.*

DECISION OF THE BOARD: September 29, 1982

1. The complainants have requested that the Board issue a direction under section 91 of the *Labour Relations Act* with respect to the assignment of certain work which was performed for the Town of Vaughan. In a decision dated July 8, 1981, the Board held that it had jurisdiction to entertain this complaint and in a decision dated October 9, 1981, the Board granted two motions which were made by the complainants with respect to an amendment of the relief claimed as set forth in a letter of the complainants dated June 3, 1981, and secondly, with respect to the amendment of the description of the work which had initially set forth in the complaint which was filed on this matter.

2. The complainant, Toronto-Central Ontario Building and Construction Trades Council ("the Council") is a Council of trade unions which are affiliated with the International Building Trades Unions and which have AFL-CIO-CLC building trades jurisdiction in Ontario, and, more particularly, in the Board's geographic area #8 and central Ontario. The complainant, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 ("Local 46"), is an affiliated local union of the Council and has approximately 4,000 members employed as plumbers, steamfitters, pipefitters, welders and apprentices thereto. Local 46 is a local union of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada ("the United Association") which is an International union having its head office in Washington D.C. and its Canadian head office in Winnipeg, Manitoba. Usually, it has

been the practice of local trade unions which are affiliated with the Council to organize along craft or trade lines.

3. Prior to the enactment of the scheme of provincial bargaining in Bill 22, Local 46 was a party to collective agreements, from time to time in effect, with the Mechanical Contractors Association of Toronto ("MCAT"), which employer's organization represented the mechanical contractors with whom Local 46 bargained. In a decision dated January 9, 1972, the Board issued a certificate of accreditation to the MCAT as the bargaining agent for all employers of plumbers, steamfitters, welders and their apprentices on whose behalf Local 46 had bargaining rights in the judicial District of York, that portion of Ontario County lying west of the Pickering/Whitby Township line, Peel County, that portion of Halton lying south of Highway 401 and east of the 7th line and Dufferin County in the industrial commercial and institutional sector of the construction industry (the "ICI sector"). Reference is made to the decision of the Board dated January 9, 1972, in Board File No. 1345-71-R.

4. The Mechanical Contractors Association of Ontario ("MACO") and the Ontario Pipe Trades Council of the United Association, are the employer and employee bargaining agencies who are designated to represent in bargaining provincial units of affiliated bargaining agents, have been parties to provincial agreements covering plumbers, steamfitters, pipefitters, welders and apprentices thereof in the employ of mechanical contractors for whom the local unions of the United Association, including Local 46, have bargaining rights in the Province of Ontario in the ICI sector. The first provincial agreement was effective from June 15, 1978, until April 30, 1980, and the subsequent provincial agreement was effective from May 21, 1980, until April 30, 1982 (the "provincial agreement").

5. Since the decision of the Ontario High Court in *Regina v. The Ontario Labour Relations Board, et al.*, (1963) 39 D.L.R. (2d) 593, the Christian Labour Association of Canada ("C.L.A.C."), an independent Canadian trade union with its head office in Toronto, has been organizing construction and other workers throughout Ontario and elsewhere in Canada. The C.L.A.C.'s usual method of organizing is to organize all employees of an employer. This results in the C.L.A.C. representing a number of different trades. Until 1963, no other trade union in Ontario organized plumbers and pipefitters except the local unions of the United Association. In 1963, the C.L.A.C. commenced to organize tradesmen in the construction industry, including plumbers and pipefitters. The bulk of the C.L.A.C.'s organizing efforts in the construction industry have been in Board areas other than geographic area #8. Apart from the local unions of the United Association, no other union in Ontario except the C.L.A.C., at present, is actively engaged in organizing plumbers and pipefitters.

6. Simcoe Mechanical Contracting Limited ("Simcoe") is a mechanical contractor with its head office in Orillia, which is in the Board's geographic area #18. Simcoe has been in the mechanical contracting business since 1960. The principals of Simcoe, Mr. C. Waunch and Mr. C. Dettmers, have also carried on the business of mechanical contracting through a corporation originally incorporated as Simkon Contracting Limited on September 27, 1976. On February 28, 1979, the name of this latter corporation was changed to Simcoe Mechanical and Electrical Contracting Limited. The work in

issue in this case has been, and continues to be performed by Simcoe. Since March of 1971, the invariable practice of Simcoe, and since 1976, that of Simkon Contracting Limited (Simcoe Mechanical and Electrical Contracting Limited) has been to employ members of the C.L.A.C. The terms of such employment are contained in the following collective agreements which have been filed with the Board:

- (a) Current collective agreement between Simcoe and the C.L.A.C., which recognizes the C.L.A.C. as the bargaining agent for all employees of Simcoe throughout Ontario and states that it is to run from May 1, 1980, to April 30, 1982. The collective agreement was actually executed by the parties on April 29, 1981;
- (b) Agreement between Simkon Contracting Limited and the C.L.A.C. effective from May 1, 1978 until April 30, 1980. By "Supplementary collective agreement" the parties to this agreement agreed to change the employer's name to Simcoe Mechanical and Electrical Contracting Limited;
- (c) Agreement dated May 10, 1976, between Simcoe and the C.L.A.C. effective from May 1, 1976, until April 30, 1978. By "supplementary collective agreement" the parties to this agreement agreed that effective February 17, 1978, the employer's name would be Simkon Contracting Limited and that "effective February 17, 1978, the collective agreement dated May 10, 1976, shall be expanded to cover and include the whole Province of Ontario." At that time Simkon Contracting Limited had employees working in the Board's geographic area #8;
- (d) Agreement dated March 28, 1974 between Simcoe and the C.L.A.C. effective from May 1, 1974 until April 30, 1976;
- (e) Agreement dated May 24, 1972, between Simcoe and the C.L.A.C. effective from August 1, 1972, until April 30, 1974;
- (f) Agreement dated March 29, 1971 between Simcoe and the C.L.A.C. effective from March 31, 1971, until July 31, 1972.

Neither Simcoe nor Simkon Contracting Limited (Simcoe Mechanical and Electrical Contracting Limited) have a bargaining relationship with the Council or any of its affiliated local unions, including Local 46, but rather only employ members of the C.L.A.C.

7. Prior to March of 1971, Simcoe's employees were represented by Local 599 of the United Association. On March 23, 1971, the Board issued a certificate to the C.L.A.C. for the Board's geographic area #18 after a representation vote in which the C.L.A.C. displaced Local 599. Subsequent certifications obtained by the C.L.A.C. are as follows:

<i>Board Area</i>	<i>Date of O.L.R.B. Certification</i>
16	September 13, 1971
28	October 10, 1972
13	March 29, 1973
30	May 30, 1974
10	July 5, 1974
9	October 28, 1974
11	June 6, 1975
1	June 25, 1977.

Since 1971, Local 599 of the United Association has attempted to displace the C.L.A.C. in respect of Simcoe's employees in the Board's geographic area #18 and part of the District of Parry Sound on two occasions. These attempted displacements led to representation votes and on both occasions the C.L.A.C. was successful in retaining its bargaining rights. Reference is made to Board File Nos. 1814-75-R and 0150-78-R.

8. This complaint arises out of certain work which was performed for the Town of Vaughan. The Town of Vaughan called tenders for the construction of its municipal administration building expansion project on Major McKenzie Drive in Maple ("the project"), and a sealed tender was submitted by C. A. Smith Contracting Limited ("Smith"), a general contractor having a working agreement with the Council. In addition, various other general contractors submitted sealed bids in connection with this project. Smith's tender carried All Can Plumbing & Heating Limited ("All Can"), as a subcontractor which was to perform the mechanical construction work at the project. All Can had executed a "pick-up" agreement with Local 46, dated July 18, 1979, by which All Can accepted the provincial agreement then in force. Smith is not a member of the MCAT or MCAO.

9. Simcoe had submitted bids to a number of general contractors, including Smith, and was the lowest of the mechanical contractors; its bid was lower than All Can's by \$134,100.00. However, Smith refused to carry Simcoe as its mechanical subcontractor because Smith was a party to a working agreement with the Council and, as such, could only carry mechanical subcontractors whose employers were members of an affiliated local union of the Council.

10. The Town of Vaughan requested that Smith delete the mechanical construction work from its tender, and on such a revised basis, on November 4, 1980, entered into a contract with Smith for all construction work at the project, save and except the mechanical construction work. On that date, the Town of Vaughan also entered into a direct contract with Simcoe for such work. In or about the first week of April, 1981, construction work commenced at the project, and on or about April 15, 1981, Simcoe commenced the mechanical construction work at the project pursuant to its contract with the Town of Vaughan and such work was carried out by plumbers and plumbers' apprentices employed by Simcoe and represented by the C.L.A.C.

11. In a letter dated April 23, 1981, the complainants requested an assignment of the mechanical construction work. In its letters dated May 12, 1981, and addressed to

the complainant Council, Simcoe denied the complainants' request to employ members of Local 46. Simcoe continued to be engaged in the performance of the work on the project and employed members of the C.L.A.C.

12. The nature of the work to be performed by Simcoe with its own employees for the Town of Vaughan has been as follows, except as noted otherwise:

1. *Site Services and Plumbing and Drainage:*

The handling, fabrication and installation of the complete plumbing and drainage systems as outlined in sections 15200 and 15400 of the specifications and approved drawings provided for the project, including:

- (a) all sanitary and storm sewers inside the building and outside to the nearest manhole, main gathering sewer, or property limit, whichever is nearest to the building;
- (b) all water and fire mains within the property lines as shown on approved drawings, etc., and handling and installation of all fire hydrants;
- (c) all waste, vent, hot and cold water piping systems, including all work involved in the extension of existing systems and the removal, relocation and/or installation of all fixtures and equipment required in section 154 00 of the specifications and accompanying drawings;
- (d) all piping systems supplemental to the plumbing systems, i.e., soap dispenser system, natural gas systems and appliances; and
- (e) all water-heaters, heat exchanges, pumps, tanks, circulators, access covers, gauges and thermometers, escutcheons, anchors, hangers, brackets and supports.

2. *Heating and Cooling Systems:*

The handling, fabrication and installation of all piping systems and related equipment for a complete heating and cooling system, as required by section 156 00 of the specifications, including:

- (a) all piping required for the heating/cooling system and condenser water systems, including heat reclamation system and water treatment system;
- (b) all boilers, pumps, chillers, heat pumps, heat exchangers, storage tanks, coils, whether heating, cooling, pre-heat or re-

heat, condenser equipment, cooling tower, as required in section 156 00 of the specifications;

- (c) all valves, expansion joints, flanges, chemical feed equipment, strainers, vents and vacuum breakers, pressure regulators, flexible connections, expansion tanks as required to complete all piping systems, including anchors, brackets and supports; and
- (d) all fin-coil, fan-coil or other radiation which is part of a piping system.

3. *Ventilation:*

- (a) The installation of all piping and regulated pumps or other equipment that may be required for the supply of spray-water, drains for drip-pans or dehumidifiers or draintank; and
- (b) the handling and installations of package air-handling units using piping coils as a means of heat-transfer, either liquid-to-air or air-to-liquid and of all fan-coil units as provided in section 158 00 of the specifications and on approved drawings.

4. *Central Systems:*

The handling, fabrication and installation of all or any pneumatic control systems which may be required to control any of the piping systems outlined above, including the handling and installation of all equipment, instruments and control panels.

This work has been sub-contracted to Robertshaw Control (Canada) Ltd. which is bound by the provincial agreement. It is a common practice in the industry to sub-contract such central systems work to specialized contractors such as Robertshaw Controls (Canada) Ltd.

5. *Sleeving, Drilling and cutting Holes:*

The sleeving or drilling of all holes required in floors or walls of the building for the installation of any or all of the piping systems outlined above.

13. Fire protection, including fire hose and the stand pipe systems, was not included in the tenders submitted by the mechanical contractors and was not in the contract between the Town of Vaughan and Simcoe. However, the fire hydrants and feed lines from the hydrants to the building were included in the mechanical subcontract

bids and in the contract between the Town of Vaughan and Simcoe. Subsequent to the execution of the contract between the Town of Vaughan and Simcoe, arrangements were made between the parties to the contract to delete the solar panels from the contract. Simcoe's original bid was for \$894,900.00, but the final contract price was \$851,000.00. The parties agree that the work performed by Simcoe at the project is the work of plumbers and pipefitters.

14. No person may work as a plumber or as a pipefitter in Ontario (regardless of sector) unless he or she has served a period of apprenticeship and received a certificate of qualification from the Ministry of Colleges and Universities. All journeymen who are members of either Local 46 or the C.L.A.C. are qualified plumbers and pipefitters and all apprentices who are members of either Local 46 or the C.L.A.C. are working towards obtaining the qualifications as plumbers and pipefitters.

15. Since March of 1971, the invariable practice of Simcoe, and since 1976, that of Simkon Contracting Limited (Simcoe Mechanical and Electrical Contracting Limited) has been to employ members of the C.L.A.C. to do plumbing and pipefitting work, including work such as the work performed at the project by Simcoe. Simkon Contracting Limited (Simcoe Mechanical and Electrical Contracting Limited) has done the following jobs in the Board's geographic area #8:

- (a) The Pump and pipe work at the Aurora Pumping Station which was completed in 1980 for \$88,900.00;
- (b) the plumbing, heating and ventilation work at the St. Paul's School in Newmarket which was completed for \$256,688.00 in 1978; and
- (c) the plumbing, heating and installation work at the Holland Landing Public School which was completed in 1979 for \$168,447.00.

16. Local 46 is the affiliated union of the Council which has AFL-CIO-CLC plumbing and pipefitting jurisdiction in an area which includes the Board's geographic area #8. The C.L.A.C. is not affiliated with the AFL-CIO-CLC and is not an affiliated trade union of the Council. There are no written agreements or informal understanding between the C.L.A.C. and Local 46, or between the C.L.A.C. and the Council as to work jurisdiction or otherwise.

17. The work referred to in paragraph 12 falls within the ICI sector. The value of plumbing and pipefitting work, including work of the same type as that referred to in paragraph 12, in the ICI sector performed in Board area #8 by contractors who have been bound to collective agreements with or binding upon Local 46, including since 1978 the provincial agreements referred to earlier, amounts to two hundred million dollars on average on an annual basis. The aggregate value of this work over the most recent ten-year period range between one billion dollars and two billion dollars.

18. The contractors referred to in the preceding paragraph have performed plumbing and pipefitting work, including work of the same type as that referred to in

describing the work at the project, in the ICI sector in the Board's geographic area #8 employing exclusively members of Local 46. These contractors include Comstock International Limited, Fischback & Moore of Canada Limited, H. Griffiths Company Limited, Niagara Mechanical Limited and Steen Contractors Limited. The plumbing and pipefitting work referred to earlier includes all, or virtually all, of the major construction projects in the Board's geographic area #8, including, by way of example, the Royal Bank Plaza, Ashbridges Bay, John Robarts Library, Canada Wonderland, First Canadian Place and Toronto International Airport, etc. The value of such contracts is often in excess of one million dollars and ranges up to twenty million dollars. The number of tradesmen engaged in plumbing and pipefitting work on each project ranges up to 400 employees.

19. In the most recent ten-year period, contractors, including Simcoe, who employ members of the C.L.A.C., have performed approximately four and a half million dollars of work of plumbing and pipefitting work, including work of the same type referred to in paragraph 12 in the Board's geographic area #8. Some examples are the Lakeview Water Treatment Plant (\$600,000.00), Oakville Pumping Station (\$600,000.00), Ajax Water Treatment Plant (\$600,000.00) and Brampton Pumping Station (\$160,000.00). Some plumbing and pipefitting work in the ICI sector is done by non-union contractors and "in-house" by workers who are either unorganized or organized by Industrial unions. The value of such work is estimated to be between ten and fifteen million dollars each year.

20. On a province-wide basis in the ICI sector of the construction industry, plumbing and pipefitting work is performed as follows:

- (a) The dollar volume of plumbing and pipefitting work in the industrial, commercial and institutional sector performed by plumbers and pipefitters of the United Association amounts to several hundred million dollars each year;
- (b) the dollar volume of plumbing and pipefitting work in the industrial, commercial and institutional sector performed by plumbers and pipefitters of the C.L.A.C. amounts to several million dollars each year; and
- (c) the dollar volume of plumbing and pipefitting work in the industrial, commercial and institutional sector performed by non-union tradesmen and "in-house" crews of tradesmen who are members of industrial unions or who are not organized by any trade union exceeds thirty million dollars annually.

21. The following is a list of the bids for the mechanical trade work received by the Toronto Bid Depository for the project affected by this complaint:

Simcoe Mechanical Contracting Limited – \$894,000.00

George A. Kelsen Limited (bid withdrawn before tenders closed) – \$950,000.00

All Can Plumbing & Heating Limited – \$1,029,000.00

Durcard Mechanical Contracts Limited – \$1,031,500.00

Monette Mechanical Contractors Limited – \$1,090,000.00

J. A. Norton & Company Limited – \$1,115,000.00

Thorner & Brown Mechanical Contractors Limited – \$1,130,571.00

Scope Mechanical Contractors Limited – \$1,145,000.00

Banelis Plumbing & Heating Limited – \$1,182,545.00.

22. As early as 1970, the Town of Vaughan made plans to quadruple the space in its municipal offices. The Town budgeted the sum of 3.6 million dollars for this additional construction. It was decided by the Town of Vaughan that a full tender call would be used in inviting bids for the construction of its additional space. An architect was retained by the Town of Vaughan and subsequently the services of a consulting engineer were retained with respect to the mechanical work for the expanded facilities. When the figures became known for the full tender call in October of 1980, it became apparent that due to the underestimating of the consulting engineer with respect to the mechanical work, and to a lesser extent also with respect to the electrical work, the project had been seriously underestimated. The full tender call submitted by Smith was 4.4 million dollars. The Town of Vaughan was disappointed that the project to quadruple its space was faced with a short fall of some eight hundred thousand dollars. The Town of Vaughan instructed its architect to examine various possibilities so that the project could be brought within budget. Various aspects were considered in order to make economies, such as changes in design, equipment and materials. Ultimately, the architect devised a scheme to reduce the cost by using Simcoe to perform the mechanical work. This meant, of course, that the mechanical work which had been included in Smith's bid would be taken away from Smith and given directly to Simcoe. This was necessary because Smith was unable and unwilling to use Simcoe as a subcontractor. Smith, of course, was unable to use Simcoe as a subcontractor because of its obligations to the Council. Before awarding the mechanical contract to Simcoe, the Town of Vaughan investigated its legal position and received advice that there were no legal obstacles to prevent it from proceeding with two separate contracts, namely, one for the mechanical work with Simcoe and one for the balance of the work with Smith.

23. Upon discovering that Simcoe was to be considered for the mechanical work, Local 46 and the Council made vigorous attempts to secure the work for members of Local 46. The Council wrote a letter to Simcoe requesting an assignment of the work in dispute and a representative of the Council spoke to the architect and also spoke at the Council meeting on November 4, 1980, and pointed out the contractual relationships between Smith and the Council and strenuously lobbied for the work to be given to members of Local 46. The efforts of Local 46 and the Council were rejected by the Town of Vaughan, and the Town of Vaughan approved the contracting of the work necessary for the project to Smith and Simcoe as aforesaid.

24. A representative of the C.L.A.C. also spoke at the Town of Vaughan Council meeting on November 4, 1980, and informed the representatives of the Town of Vaughan that the C.L.A.C. was able to handle any on-site problems which might arise in connection with the performance of the mechanical work by Simcoe using members of the C.L.A.C. The evidence before the Board indicated that both the architect and the consulting engineer had satisfied themselves that Simcoe was able to perform the work at the project, and the evidence before the Board indicated that the work being performed by Simcoe was being performed to the satisfaction of the Town of Vaughan, its architect, and its consulting engineer. The work performed by Simcoe was also up to the required schedule for the project.

25. The work at the project continued without any disruption and with harmony between the various trades who were working on the project. The work of Smith and Simcoe was co-ordinated at various times by meetings on the site. There was no evidence of any difficulty in the supervising of the work of Simcoe at the site.

26. In making directions under section 91 of the Act, the Board has used various criteria in order to make its directions. The criteria which the Board normally uses, and which the Board proposes to use in this complaint, are the criteria of collective bargaining relationships, skill and training, considerations of economy and efficiency, employer practice, and area practice. See: *Anchor Shoring Limited*, [1974] OLRB Rep. Aug. 528; *Deep Foundations Limited*, [1975] OLRB Rep. March 175, and *Urban Consolidated Construction Corporation Ltd.*, [1977] OLRB Rep. Feb. 41. There is no collective agreement between Local 46 and Simcoe. There is a collective agreement between the C.L.A.C. and Simcoe. The evidence before the Board with regard to this collective agreement established that the collective agreement was signed on April 29, 1981, and became effective on May 1, 1980. This collective agreement was signed after Simcoe commenced the project, and was signed after complaints had been made by Local 46 and the Council about the performance of the work by Simcoe with members of the C.L.A.C. The collective agreement extended its coverage into the Board's geographic area #8 for the first time on April 29, 1981, and while the collective agreement refers to plumbers, it does not mention pipefitters. While the attitude of the C.L.A.C. and Simcoe towards the signing of current collective agreements is certainly casual, there is no question that the employees working on the project were paid according to the rates provided for in the collective agreement which became in effect on May 1, 1980, from the time the collective agreement became effective. It appears from the evidence that the collective agreement was negotiated some time before it was signed, but that due to the losing of various draft copies, the collective agreement was not signed until April 29, 1981. While the present collective agreement represented an extension of the geographic area covered by the collective agreement, there was no question before the Board that the C.L.A.C. was entitled to represent the persons who were working on the site. The C.L.A.C. and Simcoe were parties to a series of collective agreements which covered both plumbers and pipefitters. The criterion of collective bargaining relationships favours the claim of the C.L.A.C. to the work in question.

27. With respect to skill and training, it is quite clear that Simcoe's employees at the project have the necessary skills and training to perform the work to the satisfaction

of the Town of Vaughan, its project co-ordinator, its architect, and its consulting engineer. There is no question on the evidence before the Board that the employees who work for Simcoe have the necessary certificates of qualification under the *Apprenticeship and Tradesmen's Qualifications Act*, R.S.O. 1980, c. 23. Local 46 has an elaborate training centre in Toronto which offers courses of instruction which are, in some instances, parallel to the courses offered by the community colleges of this province and which are also, in some instances, additional to such courses. These courses cover a wide variety of subjects and are available only to members of the United Association. The evidence is that apart from apprentices, about 200 out of a total membership of 4,000 of Local 46 attend these courses. This is about five per cent of the membership. The evidence revealed that in obtaining members from the hiring hall, there would be no way of ensuring that persons who had taken specific courses were in fact referred to job which required those courses. Moreover, there was nothing to indicate that any of the additional courses offered at the training centre were necessary for the performance of the job by Simcoe's employees at the project. The C.L.A.C. does not offer a system of private courses, and the persons who become apprentices with Simcoe apparently attend the courses given at community colleges. While the apprentices who attend the courses given at the training centre appear to have a lower failure rate than the provincial average, all journeymen who work for Simcoe, or any other employer in this province, have the certificate of qualification referred to previously. One of Simcoe's employees had not submitted himself to a retesting in connection with his welding licence. It appears that this was an oversight by Simcoe and that there was no problem with his performance of any welding work at the project. In our view, this oversight does not have any impact on the criterion of skills and training. In *Ilena Construction Company Limited*, [1974] OLRB Rep. Nov. 775, the Board indicated that attempts to increase the skill of employees through developed courses of study is a method by which a trade union can protect its jurisdictional claim with respect to certain type of work. The remarks in that case are obiter since the case appeared to turn on an assignment being made because a trade union had the jurisdiction in a particular geographic area on certain commercial projects. In the instant case, while the courses offered by Local 46 are commendable, there was no evidence before the Board to show that these courses are necessary in order for the work to be completed at the project. The criterion then of skills and training favours neither the claims of Local 46, nor the claims of the C.L.A.C.

28. The criterion of considerations of economy and efficiency favour the claims of neither Local 46 nor the C.L.A.C. It was argued that the differential in the wage rate between those two trade unions was a factor of economy which favour the claims of the C.L.A.C. The Board does not agree with this approach to the question of economy and efficiency. The fact that there is a wage differential of approximately four dollars in favour of the C.L.A.C. is not, in our view, a factor which affects this criterion of economy and efficiency. In the past, when the Board has referred to this criterion, it has referred to the fact that this criterion does not mean that the cheapest union succeeds under this heading. See: *Anchor Shoring Limited*, *supra*, and *Urban Consolidated Construction Corporation Ltd.*, *supra*. In considering the criterion of economy and efficiency, the Board considers such factors as the efficient and economical employment and scheduling of a work force, see, for example, *Adam Clark Company Limited*, Board File No. 0911-75-JD, unreported decision of the Board, dated May 21, 1976.

29. The question of the employer's practice on the facts of this case indicates that Simcoe does not have an established practice in the Board's geographic area #8. Simcoe has performed projects in the ICI sector in order Board areas, such as for example, the Board's geographic area #18. There is evidence of the practice of Simkon in the Board's geographic area #8. However, Simkon, while it obviously enjoys a close relationship with Simcoe, is not the employer on the project before the Board. The Board has never made a finding under section 63 or section 1(4) of the Act. While the nature of the relationship between the principals involved in Simcoe and Simkon indicates a close relationship, the Board is not prepared to find that the criterion of employer practice is sufficiently well established on the evidence before it so as to support the claims of the C.L.A.C.

30. The final criterion of area practice massively favours the claim of Local 46 to the work on the project. In some instances, the area practice alone has been sufficient to establish the claim of one trade union over the claim of another trade union. See, for example, *Ilena Construction Company Limited, supra*. However, in *K-Line Maintenance & Construction Limited*, [1979] OLRB Rep. Dec. 1185, the fact that area practice favoured one trade union was not sufficient to cause the Board to award the work in dispute to that trade union.

31. In many respects this complaint is not a typical complaint under section 91. In this complaint the Board is dealing with competing claims for the work in dispute based not upon a trade or test of useful skill, but rather on the basis of union membership. The employees of Simcoe have selected the C.L.A.C. more than a decade ago as their bargaining agent, and have on two occasions rejected an attempt by the locals of the United Association to displace the C.L.A.C. as their bargaining agent in secret ballots conducted by the Board. The criterion of area practice, or, as it has been characterized by the complainant, as a question of trade stability, has not always proven to be decisive before this Board. In the context of this complaint, it appears to the Board that the criterion of area practice ought not to be decisive. The complainant is part of a trade union which is represented across the Province of Ontario. It appears to the Board that there is hardly a geographic area, or a sector of the construction industry where the complainant or one of its sister local trade unions, would not be able to establish that the area practice favours its claim. If the criterion of area practice is to receive paramount weight by the Board, it will therefore follow that the C.L.A.C., notwithstanding its collective bargaining relationships and the wishes of the employees that it represents, would almost always, if not always, be unsuccessful in this criterion. The C.L.A.C. organizes on a multi-craft basis and is a much smaller trade union compared with the complainant and its sister locals. The complainant in its relief is requesting modifications to the collective agreement of the C.L.A.C. under subsections 15 and 18 of section 91, and asks the Board to exclude the Board's geographic area #8 from the coverage of that collective agreement. Presumably, it would also be open in a similar complaint for sister locals of Local 46 to request a similar modification of the collective agreement of the C.L.A.C. in their various jurisdictional areas.

32. As the Board noted earlier, this complaint is not a typical complaint under section 91 of the Act. Certainly there are two trade unions which earnestly seek the work in dispute. However, the work in dispute falls squarely within the trades of

plumbing and pipefitting, and is most certainly not marginal and not peripheral to those trades. The essential question of the skills involved underlines the fact that this complaint is essentially representational in nature rather than jurisdictional. The C.L.A.C. was variously characterized in this complaint as an irritant, as undermining the position of Local 46, and as causing instability in the industry. It was pointed out that the area practice, or industry stability, was an important factor in maintaining harmonious industrial relations in the construction industry. While the Board agrees that harmonious labour relations ought to be maintained in the construction industry, the Board does not agree that this ought to be achieved at the expense of a trade union which has been recognized as such by the Board, and which has been successful in freely establishing collective bargaining rights and collective agreements in various areas of this province. The C.L.A.C. is not an affiliated bargaining agent and, of course, is not represented by an employer bargaining agency under the scheme of province-wide bargaining in the ICI sector. Section 144(5) of the Act clearly provides a place for the existence of the C.L.A.C. and its bargaining rights in the scheme of industrial relations in the construction industry in this province. This being the case, the Board is not prepared to accept the argument of irritants, and industry stability as a reason for taking the work away from members of the C.L.A.C. No doubt the arguments concerning irritants, instability in the industry and harmonious labour relations could be made as an argument for eliminating employees who are not parties to or bound by a collective agreement with a trade union. In the result, while the various criteria have been examined, and while the criterion of area practice massively favours Local 46, and the criterion of collective bargaining relationships favours the claims of the C.L.A.C., the Board, having regard to its view of the underlying nature of this proceeding before the Board, makes the following direction:

The Board directs pursuant to section 91(1) of the Act that Simcoe Mechanical Contracting Limited continue to assign to members of the Christian Labour Association of Canada the following work:

1. *Site Services and Plumbing and Drainage:*

The handling, fabrication and installation of the complete plumbing and drainage systems as outlined in sections 152 00 and 154 00 of the specifications and approved drawings provided for the project, including:

- (a) all sanitary and storm sewers inside the building and outside to the nearest manhole, main gathering sewer, or property limit, whichever is nearest to the building;
- (b) all water and fire mains within the property lines as shown on approved drawings, etc., and handling and installation of all fire hydrants;
- (c) all waste, vent, hot and cold water piping systems, including all work involved in the extension of existing systems and the removal, relocation and/or installation of all fixtures and

equipment required in section 154 00 of the specifications and accompanying drawings;

- (d) all piping systems supplemental to the plumbing systems, i.e., soap dispenser system, natural gas systems and appliances; and
- (e) all water-heaters, heat exchangers, pumps, tanks, circulators, access covers, gauges and thermometers, escutcheons, anchors, hangers, brackets and supports.

2. *Heating and Cooling Systems:*

The handling, fabrication and installation of all piping systems and related equipment for a complete heating and cooling systems, as required by section 156 00 of the specifications, including:

- (a) all piping required for the heating/cooling system and condenser water systems, including heat reclamation system and water treatment system;
- (b) all boilers, pumps, chillers, heat pumps, heat exchangers, storage tanks, coils, whether heating, cooling, pre-heat or re-heat, condenser equipment, cooling tower, as required in section 156 00 of the specifications;
- (c) all valves, expansion joints, flanges, chemical feed equipment, strainers, vents and vacuum breakers, pressure regulators, flexible connections, expansion tanks as requiring to complete all piping systems, including anchors, brackets and supports; and
- (d) all fin-coil, fan-coil or other radiation which is part of a piping system.

3. *Ventilation:*

- (a) The installation of all piping and regulated pumps or other equipment that may be required for the supply of spray-water, drains for drip-pans or dehumidifiers or drain-tank; and
- (b) the handling and installation of package air-handling units using piping coils as a means of heat-transfer, either liquid-to-air or air -to-liquid and of all fan-coil units as provided in section 158 00 of the specifications and on approved drawings.

4. *Central Systems:*

The handling, fabrication and installation of all or any pneumatic control systems which may be required to control any of the piping systems outlined above, including the handling and installation of all equipment, instruments and control panels.

This work has been sub-contracted to Robertshaw Controls (Canada) Ltd. which is bound by the provincial agreement. It is a common practice in the industry to sub-contract such central systems work to specialized contractors such as Robertshaw Controls (Canada) Ltd.

5. *Sleeving, Drilling and Cutting Holes:*

The sleeving or drilling of all holes required in floors or walls of the building for the installation of any or all of the piping systems outlined above.

0326-82-U; 0325-82-U Steinberg Inc. (Miracle Food Mart Division), Complainant, v. Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Respondent.

Strike - Unfair Labour Practice - Union official advising employees to remain in cafeteria until dispute resolved - Whether calling or encouraging unlawful strike - No remedy required where stoppage brief and not part of pattern - Whether conduct breaching terms of prior settlement

BEFORE: Pamela C. Picher, Vice-Chairman and Board Members C. G. Bourne and C. A. Ballentine.

APPEARANCES: *Brian O'Bryne and Jack Burke for the complainant; Douglas Wray, M. Church and Sean Floyd for the respondent.*

DECISION OF VICE-CHAIRMAN, PAMELA C. PICHER AND BOARD MEMBER C. A. BALLENTINE; September 9, 1982

1. The employer has filed a complaint under section 89 of the *Labour Relations Act* alleging that the respondent trade union has violated the provisions of sections 74 and 76 of the Act (file no. 0325-82-U). Sections 74 and 76 are set out below:

Section 74

No trade union or council of trade unions shall call or authorize or threaten to call or authorize an unlawful strike and no

officer, official or agent of a trade union or council of trade unions shall counsel, procure, support or encourage an unlawful strike or threaten an unlawful strike.

Section 76

(1) No person shall do any act if he knows or ought to know that, as a probable and reasonable consequence of the act, another person or persons will engage in an unlawful strike or an unlawful lock-out.

(2) Subsection (1) does not apply to any act done in connection with a lawful strike or lawful lock-out.

It is common ground that there is a collective agreement in effect between the parties which expires on November 1, 1982. Section 72(1) of the Act prohibits strikes when a collective agreement is in operation. It reads as follows:

72-(1) Where a collective agreement is in operation, no employee bound by the agreement shall strike and no employer bound by the agreement shall lock out such an employee. R.S.O. 1970, c.232, s. 63(1).

2. The employer has filed a further complaint alleging that the union has violated section 89(7) of the Act by failing to comply with the terms of a settlement agreement entered into by the parties in March of 1982 (file no. 0326-82-U). The relevant portions of the settlement are set out below:

AGREEMENT BETWEEN:

STEINBERG INC. (MIRACLE FOOD MART DIVISION)

the "Company"

- and -

Teamsters Union Local 419

the "Union"

WHEREAS the Company and the Union are parties to a collective agreement;

AND WHEREAS the Company has instituted certain proceedings against the Union and the employees represented by the Union

AND WHEREAS the parties wish to resolve certain matters.

NOW, THEREFOR, the parties hereto agree as follows:

1. *The Union agrees to inform the employees that they are to cease and desist from refusing to work overtime in concert and from engaging in any illegal strike activity where such conduct is in violation of the Ontario Labour Relations Act. The word "strike" includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding, or slow-down or other concerted activity on the part of employees designed to restrict or limit output. Nothing herein requires an employee to work an overtime beyond the legal limit prescribed by the Employment Standards Act.*

The union further agrees that should any illegal strike activity occur subsequent to the date hereof and during the term of the current collective agreement up until the time the Union is in a legal strike position or the Company is in a legal lockout position it will use its best efforts to bring such illegal strike activity to an end.

2. The Company shall withdraw the proceedings instituted by the Company in Ontario Labour Relations Board Files 2532-81-U and 2538-81-U, and no further proceedings of any nature whatsoever shall be instituted by the Company with respect to the matters complained of in the aforesaid Board files or with respect to any complaints of illegal strike activity which the company claims occurred up to the date hereof. This is without prejudice to the right of the company to raise events which occurred up to the date hereof, in any future proceedings which may be brought by the Company with respect to any illegal strike activity occurring subsequent to the date hereof.

• • •

5. The terms of this Agreement are without prejudice to the Company taking whatever actions or proceeding in respect of actions or omissions on the part of the employees and/or the Union occurring subsequent to the date hereof.
6. *This Agreement shall not be deemed to be any admission of any wrongful conduct by the Union or the employees.*

[emphasis added]

3. Both complaints arise out of the same circumstances and have therefore been consolidated. The employer maintains that on May 5, 1982 Mr. Sean Floyd, the secretary-treasurer, business agent and negotiator for the Teamsters Union Local 419,

called or authorized an unlawful strike of 15 minutes duration by instructing some 48 employees who were in the cafeteria on their coffee break to remain where they were until he had resolved the problem at hand with management. Counsel for the employer argues that by remaining in the cafeteria for approximately 15 minutes beyond the duration of their coffee break, the employees, on Mr. Floyd's instructions, engaged in a cessation of work in combination or in concert or in accordance with a common understanding within the meaning of the definition of a strike in section 1(1)(o) of the Act. That section reads as follows:

1.-(1) In this Act,

(o) "strike" includes a cessation of work, a refusal to work or to continue to work by employees in combination or in concert or in accordance with a common understanding or a slow-down or other concerted activity on the part of employees designed to restrict or limit output.

4. The employer further maintains that on the same day Mr. Floyd threatened future illegal strikes. It is alleged that Mr. Floyd while speaking to Mr. Jack Burke, the transportation manager, stated that he wouldn't hesitate in the future to again tell the employees to stay in the cafeteria.

5. Counsel for the employer argues that Mr. Floyd's actions on May 5, 1982 not only violate sections 74 and 76 of the Act but also violate the settlement, presumably either that portion where the union agrees that should an illegal strike occur subsequent to the date of the settlement the union will use its best efforts to bring such illegal strike activity to an end or where the union agrees to inform the employees that they are to cease and desist from engaging in any illegal strike activity. There is no specific section of the settlement where the union agrees not to call or authorize an illegal strike.

6. By way of remedy counsel for the employer requests that the Board find and declare both that the union breached sections 74 and 76 of the Act and that the union failed to comply with the terms of the settlement. Counsel further requests that the Board require the union to post a notice stating that it has violated both the Act and the settlement and undertaking to adhere to both in the future. Finally, having particular regard to the alleged breach of the settlement, counsel requests that the Board make an order of costs against the union.

7. Mr. Sean Floyd is a business agent for approximately 15 of Local 419's bargaining units, containing a total of approximately 2,000 employees. He testified, largely without contradiction, to the events of May 5, 1982. Mr. Floyd stated that he returned from vacation on May 4th to find some forty calls on his recorders from employees and/or stewards at Steinbergs. These people were predominately perturbed about an alleged dispute between two members of management which was adversely affecting the employees. Although Mr. Floyd was not aware of it at the time because he had been away on vacation for some two or three weeks, a grievance had been filed by the union over the dissention between the two members of management. The matter had not been resolved by the time Mr. Floyd returned. On the evening of May 4th, Mr. Floyd called Mr. Vern McGuire, the union official who had been filling in for him as

business agent, to discuss the various problems at Steinbergs. He was informed that the problem with the bosses was heated. He told Mr. McGuire to keep the lid on the situation and confirmed that he would attend at Steinbergs the next day. In order to do so, Mr. Floyd had to cancel an unrelated negotiation meeting previously scheduled for May 5th. Mr. Floyd testified that in the course of speaking to others on the night of May 4th about the Steinbergs situation he was told by an employee that if he didn't get down to Steinbergs and settle the problem with the bosses the employees would be on the street.

8. When Mr. Floyd arrived at the employer's premises on the morning of May 5th, he was met by Mr. Frank Nelson, the grocery warehouse manager. Mr. Floyd told Mr. Nelson that he wanted to speak to Mr. Burt Preshaw, the day shift steward, because the employees were up in arms about the situation involving a night shift boss. When Mr. Preshaw did not appear within a few minutes of being called by Mr. Nelson, Mr. Floyd, with Mr. Nelson's approval, went to the cafeteria to find him.

9. Mr. Floyd reached the cafeteria at approximately 9:00 a.m. but Mr. Preshaw was not there. Approximately 48 employees, though, were there on their coffee break. Mr. Floyd testified that when he encountered employees hollering and yelling about their problems with the company, he immediately left the cafeteria to speak to management. He testified that as he left he said to the employees, "We're going to straighten this . . . mess out once and for all and you guys hang tight until I get this . . . mess straightened out." Mr. Floyd acknowledged that by "hang tight" he meant for the employees to stay in the cafeteria until he got back. He further stated that he did not expect to be more than 5 minutes.

10. On his way back to the management offices, Mr. Floyd encountered Mr. John DeSousa, the perishable warehouse manager. It is common to the testimony of both Mr. Floyd and Mr. DeSousa that Mr. Floyd said, "I told the people to hang tight [or "stay in"] there [in the cafeteria] until I go up front and get this mess straightened around."

11. Mr. Floyd then met Mr. Preshaw going towards the cafeteria and they both went to the main office to see Mr. Jack Burke, the transportation manager. On the day in question Mr. Burke was in charge of the distribution centre because the vice-president, Mr. Earle Coe, was absent.

12. The Board concludes from the largely consistent evidence of all the witnesses that the following took place at the office area: Mr. Floyd said to Mr. Burke, "Those guys are in the cafeteria and they are not going back until you settle this . . . issue. . . . [H]ow . . . do you expect them not to be upset given what has transpired here during the last little while". The problem concerning the employees was clearly identified to Mr. Burke as the problem between the two bosses. Mr. Burke left Mr. Floyd and went into a private office for between 5 and 8 minutes where the other managers were waiting for information on the situation. Mr. Burke explained what had happened and that the company would not talk to the union until the employees had gone back to work. All agreed.

13. Mr. Burke returned to Mr. Floyd and told him that the company would not discuss the problems until the employees returned to their work stations. Mr. Floyd explained to Mr. Burke that the employees wouldn't go back to work unless he agreed to

a meeting with him. Mr. Burke replied that he would meet anytime but that the employees would have to go back to work. Mr. Floyd agreed and left directly for the cafeteria to tell the employees to go back to work. He further explained to the employees that he, Mr. Burke and others were going to discuss the issues forthwith and if the company was wrong the employees would be compensated. The employees immediately left the cafeteria and were back at their work stations at approximately 9:30, fifteen minutes past the expiration of their coffee break.

14. Mr. Burke testified that while he couldn't specifically recall it, he couldn't deny Mr. Floyd's testimony that he subsequently thanked Mr. Floyd for getting the employees back to work.

15. At approximately 10:00 a.m. the same day, representatives of management met with representatives of the union to arrange an agenda for a meeting to be scheduled the following day to discuss the merits of the problems raised by the union.

16. While there is some confusion in the evidence as to the time Mr. Floyd allegedly threatened future strikes (that is, whether it was at the joint union-management meeting on May 5th or earlier while the employees were still in the cafeteria), the Board concludes from all the evidence that the alleged threat was made in the following context in the course of the May 5th meeting following the employees' return to work. Mr. Burke stated at the meeting that he considered what had happened a violation of the collective agreement, commenting further that it was serious and he wouldn't let the issue die. Mr. Floyd then said, "Go ahead and file a grievance. I told them to stay in the cafeteria and I wouldn't hesitate to do it again." The Board does not accept the further allegation that Mr. Floyd commented that this was going to be his tactic in the future.

17. Mr. Floyd testified that while he would not have directly threatened a strike, he might have said something like, "If this is the kind of action it takes to get things straightened out in the vice-president's absence then this is what I would do."

18. The Board concludes from the evidence that Mr. Floyd indicated that if the identical set of circumstances arose in the future he would not hesitate to follow his actions of May 5th and tell employees to remain in the cafeteria while he straightened out a critical problem.

19. At the scheduled meeting on May 6th, the grievance involving the two bosses was fully resolved. Mr. Burke acknowledged that Mr. Floyd commented that the company should straighten out its internal problems so that the union would not be adversely affected by rivalries between members of management.

20. Subsequent to these events the employees involved received warning letters and a 12 minute reduction in their pay. No grievances were filed challenging the employer's imposition of discipline. The employer further filed the instant complaints with the Board.

21. Mr. Burke acknowledged that over the years Mr. Floyd has met with employees in the cafeteria on numerous occasions. He further acknowledged that there have been occasions when he or other company officials have requested him to come

and speak to the employees to resolve one problem or another. He agreed with the suggestion of counsel for the union that from time to time Mr. Floyd has assisted the company in defusing unrest among the employees. Mr. Burke further agreed that it was uncharacteristic for Mr. Floyd to encourage employees not to work or to threaten an illegal strike. Mr. Burke stated that he was surprised that on May 5th Mr. Floyd told the employees to stay in the cafeteria before trying to discuss the matter with the company.

22. In reflecting on the situation Mr. Floyd stated his opinion that the company was in fact saved considerable heartache by his having kept the employees in the cafeteria for a few minutes beyond the expiration of their coffee break on May 5th in order to set a course for the resolution of the problem between the two bosses which by that date had reached an acute stage. He stated he was under a lot of pressure to get the situation settled down and commented that if he hadn't acted as he did, the employees might have been on the street.

23. The employer seeks a finding from the Board that the union, through the actions of Mr. Floyd on May 5th, has violated the *Labour Relations Act* by calling an illegal strike and threatening to do so again in the future. The employer requests that the Board issue a declaration of these violations and order a posting.

24. Having reviewed the evidence and the submissions of the parties, the Board concludes that even assuming, but without finding, that the actions of Mr. Floyd on May 5th constitute a technical breach of sections 74 or 76 of the Act, we do not in the circumstances of this case consider it appropriate to issue any remedy whatsoever.

25. The uncontradicted evidence of the union was that the problem giving rise to the May 5th incident emanated from a dispute between two bosses which was adversely affecting the employees. To that extent management may be viewed as partly, though obviously not entirely, responsible for the incident which occurred on May 5th.

26. More importantly, however, the work stoppage was not premeditated and was extremely brief, lasting as it did for only fifteen minutes. It ended approximately three weeks prior to the Board's hearing and in the intervening period there were no further work stoppages. The employer did not establish in evidence any prior incidents of illegal work stoppages. The settlement agreement entered into between the parties in March of 1982, for example, specifically provides that the agreement shall not be deemed to be an admission of any wrongful conduct by the union or the employees. No history of illegal work stoppages has therefore been established so as to cause the Board to be concerned that the instant work stoppage, albeit brief, is part of a pattern.

27. Finally, notwithstanding the allegation that Mr. Floyd threatened future illegal strikes the evidence does not cause the Board to conclude that the employer has a reasonable fear that its operations will again be disrupted in a similar manner. Although Mr. Floyd stated that if the same set of circumstances were to arise in the same way again he wouldn't hesitate to do what he did on May 5th, the Board concludes from the evidence that when Mr. Floyd made his comment to Mr. Burke on the afternoon of May 5th, he was not in fact threatening to encourage employees not to work in the future. We do not accept the suggestion that the appropriate inference to be drawn from his

comment is that Mr. Floyd meant to imply that if the employees wanted to “hit the streets” that was fine with him. The Board concludes from the evidence that through his comment Mr. Floyd was attempting to emphasize his view that what he did was to everyone’s benefit because it quickly settled down the employees and brought an end to a problem that by all reasonable appearances to a man who was called in immediately upon his return from vacation was rapidly getting out of hand. The Board is satisfied that Mr. Floyd, as the business agent summoned by the employees to deal with the unrest caused by the problem with the two bosses, acted in what he, in good faith, deemed to be the most effective way to bring an unstable situation under control. The Board rejects outright the suggestion that Mr. Floyd told management that directing employees to stay in the cafeteria was going to be his tactic in the future. It is readily apparent that his actions on May 5th were in response to particular problems and resulting unrest that had built up while he was on vacation and not part of a larger objective. Mr. Burke himself said that it was uncharacteristic for Mr. Floyd to tell employees not to work. In all of the circumstances the Board readily concludes that Mr. Floyd’s comment on the afternoon of May 5th does not create a threat of a future illegal work stoppage.

28. Contrary to the suggestion of counsel for the employer Mr. Floyd did not intentionally decline to meet with the employer about the situation before telling the employees not to return to their work stations. When Mr. Floyd arrived at Steinbergs he went to talk to employees during their break. It has not been suggested that this was not an appropriate first step. It was when he unexpectedly encountered employees who were, according to his uncontradicted evidence, yelling and hollering about the problem occasioned by the dispute between the bosses that he told them to wait where they were until he solved the problem.

29. The problem between the bosses which was the primary cause of the employee unrest was fully settled the day following the May 5th incident. The peripheral problems were also solved. At the conclusion of the union-management meetings on May 6th all of the problems connected with the incident had been fully resolved. In these circumstances and having regard to the considerations set out above, the Board declines to issue either a declaration or a posting. (Supporting the Board’s conclusion not to issue a remedy in circumstances such as these see the Board’s decisions in *National Refractories Ltd.*, (1963), 63 CLLC ¶16,276; *Norfolk Hospital Association Ontario*, [1974] OLRB Rep. Sept. 581; *Acoustical Association Ontario*, [1975] OLRB Rep. July 539; *Acme Building and Construction Limited*, [1975] OLRB Rep. Nov 810; *Consolidated Bathurst Packaging Limited*, [1976] OLRB Rep. Dec. 790; and *BCL Canada Inc.*, [1981] OLRB Rep. July 836.)

30. We turn to the complaint that through the May 5th incident, the union failed to live up to the settlement agreement entered into between the parties in March of 1982. In reply argument counsel for the employer stated that his complaint concerning the alleged breach of the settlement agreement was not that Mr. Floyd had failed to use his best efforts to bring any future illegal strike activity to an end but that he himself called or authorized an illegal strike. The settlement agreement states in paragraph 1 that the union will inform employees that they are to cease and desist from engaging in any illegal strike activity. While it might naturally be understood and expected a union

would not act in a manner contrary to the *Labour Relations Act*, the settlement agreement does not specifically state that the union undertakes not to call or authorize an unlawful strike.

31. The Board is satisfied that Mr. Floyd did not on May 5th or 6th engage in conduct that was a clear violation of the settlement agreement. Accordingly, the employer has failed to establish a breach of section 89(7).

32. Having regard to the foregoing a remedy under section 89 of the Act is hereby denied with respect to both the alleged violation of sections 74 and 76 of the Act and the alleged violation of the settlement agreement. The complaints are hereby dismissed.

DECISION OF BOARD MEMBER, C. G. BOURNE;

1. I dissent.

2. The uncontradicted evidence given in this case clearly establishes that the employees were instructed by Mr. Floyd to stay in the lunch room. "... to hang tight there until I go up front and get this mess straightened around," and later Floyd told Blake "Those guys are in the cafeteria and they are not going back until you settle this..."

3. The majority award also reports "that if the same set of circumstances were to arise in the same way again, he (Floyd) wouldn't hesitate to do what he did on May 5th."

4. Whether or not these statements constitute actual incitement to strike, they certainly condone work stoppages as an effective way of settling disputes at the workplace. Such an attitude encourages poor industrial relations. As noted in *Westeel Roscoe Limited* [1981] OLRB Rep. Dec. 1849 at paragraph 13:

"A basic thrust of the *Labour Relations Act* is that industrial peace will not be disrupted during the currency of a collective agreement. To that end, section 42 of the Act requires that every collective agreement shall contain, or be deemed to contain, a provision that there shall be "no strikes or lockouts" and section 72 of the Act contains a prohibition against strikes or lockouts except under specified circumstances. Additionally, sections 74 and 75 of the Act set forth in clear language prohibitions on the calling or authorizing, or threatening to call or authorize, or counselling, procuring, supporting or encouraging of an unlawful strike or lockout. Having regard to the comprehensive and detailed manner in which the Legislature has directed its attention to the importance of precluding the disruption of industrial peace through strikes or lockouts, it would, in my view, require the most explicit language in some other statute to negate or over-ride that legislative intent, ..."

The Board in that instance went on to issue a declaration that section 74 of the Act had been breached.

5. There are some mitigating circumstances in this case but these, in my opinion, go solely to the matter of remedy. I would not suggest that any further steps be taken although a posting might well have been considered to discourage further incidents.

6. There is no doubt in my mind that the Act has been breached, and that a declaration to that effect should issue from the Board.

0668-81-R Labourers' International Union of North America, Local 1081, Applicant, v. **Warren Bitulithic Limited**, Respondent, v. International Union of Operating Engineers, Local 793, Intervener

Bargaining Rights – Certification – Voluntary Recognition – Intervener Union certified to represent respondent's equipment operators – Parties negotiating scope clause to extend unit to include construction labourers – Whether union entitled to represent labourers at relevant time – Time recognition agreement entered into relevant time – No bar to applicant's certification application to represent labourers

BEFORE: Ian Springate, Vice-Chairman and Board Members W. Gibson and C. A. Ballentine.

APPEARANCE: *C. M. Mitchell, L. Steinberg and Ernie Bairos for the applicant; S. C. Bernardo, Joe Gurowka and Eric Yonge for the respondent; Maureen Kenny, Lewis Gotthell, Joe Kennedy, Jack Redshaw and H. B. Gillis for the intervener.*

DECISION OF THE BOARD; September 14, 1982.

1. This is an application for certification filed pursuant to the construction industry provisions of the *Labour Relations Act*.

• • •

3. By way of this application the applicant, Labourers' International Union of North America, Local 1081 (the "Labourers' Union") is seeking to acquire bargaining rights for construction labourers in the employ of the respondent in the Kitchener area. The Board's practice is to describe the geographic scope of bargaining units in the area so as to encompass all of the Regional Municipality of Waterloo except for that portion lying within the geographic township of Beverly. Both the respondent and International Union of Operating Engineers, Local 793, (the "IUOE") contend that the construction labourers for whom the Labourers' Union seeks to be certified are already represented by the IUOE and are covered by the terms of a subsisting collective agreement entered into between the respondent and the IUOE. If this contention is correct, then pursuant to the provisions of section 5 of the Act, the instant application would be untimely.

4. The respondent is a paving contractor that operates in various parts of the province. Until the events set out below, its employees working in the Regional

Municipality of Waterloo had not been represented by any trade union. In certain other areas of the province, however, the labourers in its employ were represented by locals of the Labourers' Union and its equipment operators were represented by the IUOE.

5. On May 8, 1980 the IUOE applied to the Board to be certified to represent a craft unit of equipment operators in the employ of the respondent in the Regional Municipality of Waterloo. The IUOE claimed that there were nine employees in the applied for bargaining unit, whereas the respondent initially took the position that there were eighteen. After somewhat protracted proceedings, the Board concluded that there had in fact been nine employees in the bargaining unit at the time the application was filed. The IUOE filed acceptable membership evidence on behalf of five of these employees. In that this represented membership evidence on behalf of more than 55 per cent of the employees in the bargaining unit, the Board issued a certificate to the IUOE with respect to equipment operators. The certificate was dated March 10, 1981.

6. In February of 1981 the respondent realized that the IUOE was likely to be certified to represent its equipment operators. The respondent was concerned that such a certification might interfere with its practice of at times assigning labourers to operate equipment and equipment operators to do labouring work. In response to this concern, officials of the respondent proposed to Mr. J. Kennedy, the IUOE's business manager, that they enter into an "all employee" collective agreement which would cover not only equipment operators, but also labourers and truck drivers. Mr. Kennedy accepted this proposal, in large measure because he felt that it was one way of ensuring that the respondent would enter into a collective agreement with the union.

7. As already indicated, the IUOE was formally certified for a unit of equipment operators on March 10, 1981. On April 3, Mr. Kennedy and Mr. J. Gurowka, the respondent's executive vice-president and general manager, met to discuss a possible collective agreement. At this meeting the two men reached agreement on most of the terms for a proposed collective agreement. One of the terms agreed to was the wording of an "all employee" recognition clause. It should be noted that at the time of the meeting, the respondent had not yet recalled any employees from its annual winter shut-down. On May 20, 1981, after a number of employees had been recalled, Mr. Gillis, an IUOE representative, met with the employees at the respondent's shop in Kitchener. Mr. Gillis advised the employees of what had occurred to date. Some of the employees told Mr. Gillis that they did not wish to be represented by the IUOE, while others asked questions about "how good a deal" the union could get for them.

8. On May 25, 1981 the IUOE and the respondent signed a Memorandum of Agreement setting out the terms of collective agreement which was to remain in effect until December 31, 1982. The memorandum was made "subject to ratification by the employees involved". On May 25th it was agreed that Mr. Kennedy would be allowed to meet with the respondent's employees on the morning of May 16th at the company's yard in Kitchener. The respondent's foremen were directed to advise the employees of the meeting.

9. On the morning of May 26th Mr. Kennedy met with approximately fourteen of the respondent's employees. Both equipment operators and labourers were present at the meeting. Mr. Kennedy opened the meeting by introducing himself to the employees. He

then stated that the IUOE had been certified to represent equipment operators, but that the company and the union had agreed to expand the bargaining unit to cover all employees. Mr. Kennedy also explained that the union had negotiated a proposed collective agreement, which he wanted to review with them. There was some marked variations between the testimony of the various witnesses concerning what happened during the remainder of the meeting. Having carefully reviewed the evidence, however, we are satisfied that the following is what occurred.

10. After Mr. Kennedy had made his opening statement, a number of labourers indicated to him that they did not want to be represented by the union. However, as the meeting progressed, objections were raised only with respect to certain of the terms of the proposed collective agreement. As a result of these objections Mr. Kennedy on three separate occasions left the meeting to talk with Mr. Gurowka. As a result of these talks Mr. Gurowka agreed to certain wage increases and also to advance the date of one of the wage increases already agreed to. Mr. Gurowka also agreed to having the respondent pay the employees for the time spent at this meeting as well as for the time they had spent meeting with Mr. Gillis on May 20th. Each time after he met with Mr. Gurowka, Mr. Kennedy returned to the meeting and advised the employees as to what had been agreed to. Towards the end of the meeting Mr. Kennedy asked if there was anything more the employees wanted him to do. When no one spoke up Mr. Kennedy assumed that although no formal ratification vote had been taken, he had the approval of the employees for the collective agreement. Mr. Kennedy also assumed that he had the approval of the employees to the expansion of the scope of the bargaining unit. It is clear from the testimony of some of the labourers who attended at the hearing, however, that although they did not speak out at the end of the meeting, at the time they did not want to be represented by the IUOE. It should be stressed that at no point during the meeting were the labourers ever asked to vote on or otherwise indicate whether or not they wanted the IUOE to represent them.

11. It is clear that both the IUOE and the respondent understood that the proposed terms of the collective agreement had been ratified by the employees at the meeting on May 26, 1981. Subsequent to May 26th Mr. Kennedy reminded the respondent that the collective agreement provided for mandatory union membership in the IUOE. Subsequent to this, one of the company's foremen drove Mr. Gillis, the union representative, to the various sites where the respondent's employees were working. Mr. Gillis had all of the employees sign IUOE membership cards. It is probably safe to assume that in talking to the employees Mr. Gillis advised them that it was now a condition of continued employment with the respondent that they sign IUOE cards. In these circumstances we do not view these cards as evidence of employee wishes on May 26, 1981. It is to be noted that a few weeks after they signed IUOE cards a number of labourers employed by the respondent signed membership cards in the Labourers' Union, and these cards were filed in support of the Labourers' application for certification.

12. The Labourers' Union takes the position that at the time the collective agreement was entered into the IUOE was not entitled to represent labourers, and accordingly the collective agreement should be set aside insofar as it purports to apply to them. In support of this position, the Labourers' Union relies on section 60 of the Act, which provides as follows:

60.-(1) Where an employer and a trade union that has not been certified as the bargaining agent for a bargaining unit of employees of the employer enter into a collective agreement, or a recognition agreement as provided for in subsection 16 (3), the Board may, upon the application of any employee in the bargaining unit or of a trade union representing an employee in the bargaining unit, during the first year of the period of time that the first collective agreement between them is in operation, or, if no collective agreement has been entered into, within one year from the signing of such recognition agreement, declare that the trade union was not, at the time the agreement was entered into, entitled to represent the employees in the bargaining unit.

(2) Before disposing of an application under subsection (1), the Board may make such inquiry, require the production of such evidence and the doing of such things, or hold such representation votes, as it considers appropriate.

(3) On an application under subsection (1), the onus of establishing that the trade union was entitled to represent the employees in the bargaining unit at the time the agreement was entered into rests on the parties to the agreement.

(4) Upon the Board making a declaration under subsection (1), the trade union forthwith ceases to represent the employees in the defined bargaining unit in the recognition agreement or collective agreement and any collective agreement in operation between the trade union and the employer ceases to operate forthwith in respect of the employees affected by the application.

13. At the commencement of the hearing it was contended by counsel for the IUOE that section 60 had no application to these proceedings in that the section refers to trade unions which have not been certified, whereas the IUOE had in fact been certified by the Board. The Board orally rejected this contention. The IUOE was certified for a unit comprised only of equipment operators. Had the union and the respondent entered into a collective agreement covering such a bargaining unit, then section 60 could have no application. As it was, however, they entered into a collective agreement for a different and larger bargaining unit. In that with respect to this bargaining unit that the IUOE had not been certified, the Board indicated that the provisions of section 60 did apply. The Board further advised the parties that pursuant to section 60(3) of the Act, the onus of establishing that the IUOE was entitled to represent the employees in the enlarged bargaining unit rested with the respondent and the IUOE.

14. Counsel for the respondent contended that the applicable date for determining whether the IUOE had been entitled to represent the employees was April 3, 1981, the date on which the IUOE and the respondent agreed upon the wording of an "all employee" bargaining unit. As of April 3, 1981 the respondent had no employees. It was the submission of respondent's counsel that all the parties had done on April 3rd was to

extend the scope of the bargaining unit to cover a vacant classification, and that the Board had approved of such a procedure in *J.C. Milne Const. Co. (Canada) Inc.*, [1979] OLRB Rep. March 220. In the *J.C. Milne* case the Board concluded that there was nothing improper about an employer voluntarily recognizing a local of the Labourers' Union on an industrial, commercial and institutional sector project not only for construction labourers but also for employees engaged in cement finishing, waterproofing and restoration work, even though at the time no one was actually performing cement finishing, waterproofing or restoration work. In our view the reasoning in the *J.C. Milne* case has no application to the facts before us. Section 60 makes it clear that the applicable time for ascertaining whether a union was entitled to represent a unit of employees is when the agreement was entered into. This was not on April 3, 1981, as the respondent contends but rather on May 25, or May 26, 1981 at a time when there were in fact labourers in the respondent's employ. We would also note that in the *J.C. Milne* case the Board based its decision largely on the fact that Ontario Locals of the Labourers' Union represent substantial numbers of employees engaged in cement finishing, waterproofing and restoration work, and that in recognition of this, the employee bargaining agency for the Labourers' Union had been designated to represent in bargaining in the industrial, commercial and institutional sector not only construction labourers, but also employees engaged in cement finishing, waterproofing or restoration work. The IUOE does not have a similarly widespread practice of representing labourers, and its designation makes no reference to labourers.

15. In the past the Board has said that for a trade union to establish its entitlement to enter into a voluntary recognition collective agreement, the union must establish that it represented a majority of the employees in the bargaining unit at the time it entered into the agreement. See: *T.R.S. Food Services Limited* [1980] OLRB Rep. March 360. The respondent filed a list of its employees in the Kitchener area on May 26, 1981. The list contained a total of fifteen names. In its application for certification, the IUOE filed membership evidence on behalf of three of these employees. No additional membership evidence was filed in these proceedings. Accordingly, it is clear that at the time the collective agreement in question was entered into, fewer than 50 per cent of the employees in the bargaining unit were members of the IUOE. Accordingly, the IUOE membership evidence does not establish that it was entitled to represent the employees in the bargaining unit.

16. It was the contention of counsel for the respondent that as a result of the Board's action in certifying the IUOE on March 10, 1981, the union was automatically entitled to represent all equipment operators, whether union members or not. Counsel further noted that the list of employees filed by the respondent indicated that most of its employees as of May 26, 1981 were classified as full or part-time equipment operators. The viva-voce evidence before us, however, indicates that those classified on the list as part-time operators operated equipment only infrequently and that they were essentially employed as labourers. Further, there is nothing to indicate that any of them actually operated equipment on May 26, 1981. This being the case, we are satisfied that at the relevant time they did not come within the unit of operators covered by the Board's certificate. Having regard to the above, we are satisfied that only six (or seven if a paver screed operator is included) of the fifteen employees employed by the respondent on May 26, 1981 came within the bargaining unit covered by the IUOE's certificate. Accordingly, even if we were to accept the respondent's approach to the issue as

correct, even then the IUOE would not have been entitled to represent a majority of the employees covered by the collective agreement.

17. The position taken by the IUOE is that the involvement of the employees at the meeting with Mr. Kennedy on May 26, 1981 indicated that they desired to be represented by the IUOE, and that this was sufficient to establish that the IUOE was entitled to represent them. In support of this position the respondent relied on the Board's decision in *Gilbarco Canada Ltd.* [1971] OLRB Rep. March 155. In that case an independent union had been certified to represent the employees of a company in Toronto. Subsequently the company moved its operations to Brockville, and a few of the Toronto employees moved with the company. Under the leadership of one of the employees from Toronto a new independent union was formed bearing the same name as had the union in Toronto. The formation of the new union was done at a meeting where a majority of the Brockville employees were in attendance. Later a majority of the employees also attended at meetings where they discussed negotiations with the company and ratified a proposed collective agreement. In these circumstances, the Board concluded that the union represented the employees in Brockville. The Board also went on to comment as follows:

There is a further ground for rejecting this application which flows from equity. The function of section 45a (now section 60) is to protect employees by enabling this Board to set aside collective agreements entered into by a trade union and an employer in a situation where the trade union does not represent the employees. The section envisions protecting the rights of employees to join a trade union of their own choice and to have their chosen trade union represent them in collective bargaining. In this case the employees freely and actively selected a trade union to represent them and participated in the procedures leading to the signing of a collective agreement. In our view section 45a is not intended to protect the employees in this type of situation. There is no evidence of any misrepresentation or fraud which induced these employees to set up the *Gilbarco Employees' Union* and to ratify the collective agreement.

18. In our view the facts before us are so different from those in the *Gilbarco* case, as to make the reasoning in that case inapplicable. Whereas the *Gilbarco* case involved employees voluntarily grouping themselves together to form an independent trade union, here there was no comparable "grass roots" movement on the part of the labourers to bring in the IUOE. Instead the IUOE and the respondent agreed to expand the bargaining unit without any consultation with the affected employees. Employees were told by their foremen to be at the May 26th meeting, and at no point during the meeting were they asked to give their views about being represented by the IUOE. In our view, what occurred on the 26th fell far short of demonstrating that the employees "freely and actively selected a trade union to represent them" as was the situation in the *Gilbarco* case. We are accordingly not satisfied on the basis of the events at the meeting on May 26, 1982 that the IUOE was entitled to represent the employees in the bargaining unit.

19. Having regard to the above, we are of the view that the respondent and the IUOE have failed to establish that the IUOE was entitled to represent the employees in the bargaining unit at the time the collective agreement was entered into, and pursuant to section 60(1) we do so declare. In accordance with the provisions of section 60(4) of the Act, the collective agreement between the respondent and the IUOE no longer applies to employees not covered by the Board's certificate of March 10, 1981.

20. The Board now turns to consider the application for certification filed by the Labourers' Union.

21. On the basis of the material before it, the Board finds that Labourers' International Union of North America, Local 1081, is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

22. The Board further finds that all construction labourers in the employ of the respondent in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the respondent appropriate for collective bargaining.

23. The respondent filed a list of employees indicating that there were six employees in the bargaining unit at the time the application was filed. The applicant filed evidence of membership on behalf of all of these employees. The evidence of membership takes the form of one certificate of membership and five combination applications for membership and receipts. The certificate is signed by the member and indicates that monthly dues of \$8.00 have been paid for at least one month within the six month period immediately preceding the terminal date of the application. The certificate is checked and certified correct by an officer of the applicant. The combination applications for membership are signed by the employees and the receipts are countersigned and indicate that a payment of at least \$1.00 has been made within the six month period immediately preceding the terminal date of the application. The money was collected by more than one person. The applicant also filed a duly completed Form 80, Declaration Concerning Membership Documents, Construction Industry.

24. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on July 3, 1981, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

25. A certificate will issue to the Labourers' International Union of North America, Local 1081.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING AUGUST 1982

BARGAINING AGENTS CERTIFIED

No Vote Conducted

2645-81-R; 2664-81-R: United Food and Commercial Workers International Union Local 1000A, AFL-CIO-CLC, (Applicant) v. Keele-Wilson Supermarket Limited c.o.b. as Tops Food Market, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent in Brampton, Ontario save and except department managers, head cashiers, persons above the rank of department managers, head cashiers, persons above the rank of department manager and head cashier, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (30 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: (*See Bargaining Agents Certified Subsequent to a Post Hearing Vote*).

0082-82-R: Retail, Wholesale and Department Store Union AFL:CIO:CLC:, (Applicant) v. Canadian Motor Hotel (Sault Ste. Marie) Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Sault Ste. Marie save and except managers and persons above the rank of manager." (43 employees in unit). (*Clarity Note*).

0372-82-R:: Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Brink's Canada Limited, (Respondent) v. Group of Employees, (Objectors).

Unit #1: "all employees of the respondent at North Bay, save and except dispatchers, persons above the rank of dispatcher, office, clerical and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (2 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent at North Bay, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except dispatchers, persons above the rank of dispatcher, and office, clerical and sales staff." (6 employees in unit). (*Having regard to the agreement of the parties*).

0431-82-R: Canadian Union of Public Employees, (Applicant) v. Regional Municipality of Hamilton-Wentworth, (Respondent).

Unit: "all employees of the respondent employed at 50 Murray Street West, in the City of Hamilton, save and except supervisors, employees above the rank of supervisor, and clerical employees." (28 employees in unit). (*Having regard to the agreement of the parties*).

0663-82-R: Canadian Union of Public Employees, (Applicant) v. L & G Housekeeping Inc., (Respondent).

Unit: "all employees of the respondent at Barton Place Nursing Home, Toronto, save and except supervisors and persons above the rank of supervisor." (14 employees in unit). (*Having regard to the agreement of the parties*.)

0684-82-R: Sheet Metal Workers' International Association Local Union 504, (Applicant) v. Sudbury Roofing Limited, (Respondent).

Unit #1: "all employees of the respondent engaged in roofing in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (7 employees in unit).

Unit #2: "all employees of the respondent engaged in roofing within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of foreman." (7 employees in unit).

0685-82-R: Service Employees Union, Local 204 affiliated with A.F. of L., C.I.O., C.L.C., (Applicant) v. St. Raphael's Centre Limited, (Respondent).

Unit: "all employees of the respondent employed in its nursing home in Metropolitan Toronto save and except registered nurses, graduate nurses, undergraduate nurses, physiotherapists, occupational therapists, director of activities, supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period, and persons covered by subsisting collective agreements." (14 employees in unit). (*Having regard to the agreement of the parties*).

0686-82-R: Canadian Union of Public Employees, (Applicant) v. Yorklea Children's Lodges Incorporated, (Respondent).

Unit: "all employees of the Respondent at 49 and 51 Chapman Avenue in Metropolitan Toronto, save and except House Supervisor, those above the rank of House Supervisor, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period." (9 employees in unit). (*Having regard to the agreement of the parties*).

0739-82-R: Hotel, Restaurant & Cafeteria Employees Union, Local 75, (Applicant) v. Movel Restaurants Limited, c.o.b. as Movenpick Restaurants of Switzerland, (Respondent).

Unit #1: "all employees of the respondent in Metropolitan Toronto, save and except supervisor, save and except supervisors, persons above the rank of supervisor, sales staff, office and clerical employees, maintenance engineer, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (57 employees in unit). (*Having regard to the agreement of the parties*). (*Clarity Note*).

Unit #2: "all employees of the respondent regularly employed for not more than 24 hours per week and students employed during the school vacation period in Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor, sales staff, office and clerical employees of the respondent appropriate for collective bargaining." (9 employees in unit). (*Having regard to the agreement of the parties*).

0752-82-R: Labourers' International Union of North America, Local 1089, (Applicant) v. MHG/DB-Catalytic Joint Venture, (Respondent).

Unit #1: "all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (9 employees in unit).

Unit #2: "all construction labourers in the employ of the respondent in the County of Lambton, excluding the industrial, commercial and institutional sector, save and except non-working foremen persons above the rank of non-working foreman." (9 employees in unit).

0766-82-R: Hotel, Restaurant and Cafeteria Employees Union, Local 75, (Applicant) v. Panache Rotisseurs Inc., operating under the name and style of St. Hubert Bar-B-Q., (Respondent).

Unit: "all employees of the respondent at its location at 715 Burnhamthorpe Road West, Mississauga, Ontario save and except the Unit Manager, Unit Assistant Manager, Dining Room Manager, Assistant Managers, persons above the rank of supervisor, sales and accounting of office staff." (61 employees in unit). (*Having regard to the agreement of the parties*).

0767-82-R: Labourers' International Union of North America, Local 183, (Applicant) v. Elective Management Services, (Respondent).

Unit: "all employees of the respondent engaged in cleaning at 234,236, 238 Albion Road, Rexdale, including resident superintendents, save and except property manager, office and clerical staff." (8 employees in unit).

0778-82-R: Bakery, Confectionary & Tobacco Workers' International Union, Local 264, (Applicant) v. Utility Vault Company of Canada Limited, (Respondent).

Unit: "all employees of the respondent in the Township of Puslinch, Ontario, save and except foremen and persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (19 employees in unit). (*Having regard to the agreement of the parties*).

0784-82-R: Ontario Public Service Employees Union, (Applicant) v. Brant County Ambulance Service Limited, (Respondent).

Unit: "all employees of the respondent at Brantford, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except supervisors, persons above the rank of supervisor and office staff." (7 employees in unit). (*Having regard to the agreement of the parties*).

0793-82-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Border Glass & Aluminum Ltd., (Respondent) v. Border Glass & Aluminum Ltd. Employees Association, (Intervener) v. Group of Employees, (Objectors).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit). (*Clarity Note*).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the District of Kenora including the Patricia portion, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit). (*Clarity Note*).

0801-82-R: Hotel, Restaurant and Cafeteria Employees Union, Local 75, (Applicant) v. The Strand Restaurant, (Respondent) v. Group of Employees, (Objectors)

Unit #1: "all employees of the respondent, at The Strand Restaurant, First Canadian Place, 77 Adelaide Street West, Toronto, Ontario, save and except Head Chef, Maitre d', Supervisors, persons above the rank of Supervisor, sales, accounting and office staff, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period, and students engaged in a recognized school, college or governmental training program." (27 employees in unit).

Unit #.2: "all employees of the respondent who are regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period at The

Strand Restaurant, First Canadian Place, 77 Adelaide Street West, Toronto, Ontario, save and except Head Chef, Maitre d', Supervisors, persons above the rank of Supervisor, sales, accounting and office staff, and students engaged in a recognized school, college or governmental training program." (17 employees in unit).

Unit #3: (*See: Applications for Certification Dismissed – No Vote Conducted*)

Unit #4: (*See: Applications for Certification Dismissed – No Vote Conducted*)

0812-82-R: Retail Clerks Union, Local 1977, chartered by the United Food and Commercial Workers International Union, C.L.C., A.F.L.-C.I.O., (Applicant) v. Zehrs Markets (A Division of Zehrmart Limited), (Respondent).

Unit: "all employees of the respondent in its retail stores at Listowel, Ontario, save and except store manager and persons above the rank of store manager." (54 employees in unit). (*Having regard to the agreement of the parties*).

0813-82-R: Ironworkers District Council of Ontario and Ironworkers Local Unions, 721, (Applicants) v. Resource Company-Metal Engineering Company, (Respondent).

Unit #1: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all ironworkers and ironworkers' apprentices in the employ of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

0834-82-R: Laundry and Linen Drivers and Industrial Workers, Local 847, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Lander Co. Canada Limited, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, Ontario, save and except foremen and foreladies, persons above the rank of foreman and forelady, laboratory technicians, office and sales staff, students employed during the school vacation period and persons regularly employed for not more than twenty-four (24) hours per week." (31 employees in unit). (*Having regard to the agreement of the parties*).

0848-82-R: Health, Office & Professional Employees, Division of Local 206, Retail, Commercial & Industrial Union, Chartered by United Food & Commercial Workers International Union, (Applicant) v. Sweetbriar Nursing Home, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Township of Sunnydale, Ontario save and except Administrator, Tri-Ministry Service Co-Ordinator, Director of Nursing, those above the rank of Tri-Ministry Service Co-Ordinator and Director of Nursing, Registered Nurses, Food Services supervisor and Tri-Ministry Service Co-Ordinator Secretary." (45 employees in unit). (*Having regard to the agreement of the parties*).

0852-82-R: Canadian Union of Public Employees, (Applicant), v. The North York Public Library Board, (Respondent).

Unit: "all employees of the respondent at the city of North York, North York, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the

school vacation period, save and except Area Branch Heads, and persons at and above the rank of Area Branch Head, pages and persons covered by subsisting collective agreements.” (154 employees in unit). (*Clarity Note*).

0866-82-R: International Beverage Dispensers’ and Bartenders’ Union, Local 280 of the Hotel & Restaurant Employees and Bartenders’ International Union AFL-CIO-CLC, (Applicant) v. Vered & Harvey Co. Ltd., Known as: Almost Hotel, (Respondent).

Unit: “all male and female tapmen, waiters, bar boys and improvers in the employ of the respondent at the Almost Hotel, Etobicoke, Ontario, save and except manager and those above the rank of manager.” (5 employees in unit).

0889-82-R: International Union of Operating Engineers, Local 793, (Applicant) v. Vemar Construction Ltd., (Respondent).

Unit #1: “all employees of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit).

Unit #2: “all employees of the respondent in the Municipality of Metropolitan Toronto, the Regional Municipality of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, save and except non-working foremen and persons above the rank of non-working foreman.” (4 employees in unit).

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

0347-82-R: The Superb Fashions Employees’ Association, (Applicant) v. Superb Fashions Limited, (Respondent) v. International Ladies’ Garment Workers’ Union, (Intervener).

Unit: “all employees of the respondent in Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office and sales staff, shippers, mechanics, persons regularly employed for not more than twenty-four hours per week and students employed during the school vacation period.” (11 employees in unit).

Number of names of persons on revised voters’ list		11
Number of persons who cast ballots	11	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		10
Number of ballots marked in favour of intervener		0

Bargaining Agents Certified Subsequent to a Post Hearing Vote

2645-81-R; 2664-81-R: United Food and Commercial Workers International Union Local 1000A AFL-CIO-CLC, (Applicant) v. Keele-Wilson Supermarket Limited c.o.b. as Tops Food Market, Respondent), v. Group of Employees, (Objectors).

Unit #1: (*See Bargaining Agents Certified – No Vote Conducted*).

Unit #2: "all employees of the respondent in Brampton, Ontario regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except department managers, head cashiers, persons above the rank of department manager and head cashier, and office staff." (30 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		30
Number of persons who cast ballots	41	
Number of ballots marked in favour of applicant		22
Number of ballots marked against applicant		16
Ballots segregated and not counted		3

0509-82-R: Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild (CLC-AFL-CIO), (Applicant) v. The Globe and Mail, Division of Canadian Newspapers Company Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all district sales representatives employed by the respondent in its Circulation Department in the Province of Ontario save and except branch supervisors, persons above the rank of branch supervisor, agents and motor route operators, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period, and employees presently covered by subsisting collective agreements." (86 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared		77
Number of persons who cast ballots	68	
Number of ballots marked in favour of applicant		45
Number of ballots marked against applicant		22
Ballots segregated and not counted		1

0652-82-R: Independent Canadian Steelworkers' Union, (Applicant) v. Advanced Extrusions Limited (Respondent), v. Advanced Extrusions Employees' Association, (Intervener) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent at Penetanguishene, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, students employed during the school vacation period, and persons regularly employed for not more than twenty-four hours per week." (168 employees in unit).

Number of persons on voters' list		140
Number of persons who cast ballots	128	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		79
Number of ballots marked in favour of intervener		48

Applications for Certification Dismissed – No Vote Conducted

0340-82-R: The Canadian Union of Public Employees, (Applicant) v. The Board of Education for the City of North York, (Respondent).

0659-82-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Far North Construction Limited, (Respondent).

0801-82-R: Hotel, Restaurant and Cafeteria Employees Union, Local 75, (Applicant) v. The Strand Restaurant, (Respondent) v. Group of Employees, (Objectors).

0808-82-R; 0809-82-R: Service Employees Union, Local 204 affiliated with the AFL, CIO, CLC, (Applicant) v. Canadian Tire Corporation Limited – Pit Stops, (Respondent).

0943-82-R: International Union of Allied, Novelty and Production Workers, Local 905, (Applicant) v. Leisure Dynamics of Canada Ltd., (Respondent).

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

2694-81-R: Labourers' International Union of North America, Local 837, (Applicant) v. Cooper Construction Company Limited, (Respondent) v. Operative Plasterers and Cement Masons International Association, Local 598, (Intervener).

Unit: "all working foremen, journeymen, apprentice cement masons and waterproofers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all working foremen, journeymen, apprentice cement masons, and waterproofers in the employ of the respondent in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen, and persons above the rank of non-working foreman." (79 employees in unit).

Number of names of persons on list as originally prepared		2
Number of persons who cast ballots	2	
Number of ballots excluding segregated ballots cast by persons whose name appear on voters' list		1
Number of segregated ballots cast by persons whose name appear on voters' list		1

0534-82-R: United Headwear, Optical Allied Workers Union of Canada, Local 3, (Applicant) v. Muir Cap & Regalia Limited, (Respondent) v. Capmakers Union – Local 47 of the United Hatters, Cap and Millinery Workers' International Union -CLC-, (Intervener).

Unit: "all employees of the respondent employed as Cutters, Blockers, Operators, Finishers and Utility Workers required by the respondent in the manufacturing of all headwear such as hats, caps and/or children's headwear, save and except packers, foreman, office and sales staff and persons regularly employed for not more than twenty-four (24) hours per week." (6 employees in unit). (Ballots not counted).

0697-82-R: Canadian Union of Operating Engineers & General Workers, (Applicant) v. Blue Line Taxi Co. Limited, (Respondent).

Unit: "all single plate owners and operators and drivers of the respondent licensed by the City of Gloucester save and except supervisors, those above the rank of supervisor and persons covered by subsisting collective agreements." (26 employees in unit).

Number of names of persons on list as originally prepared		28
Number of persons who cast ballots	15	
Number of ballots marked in favour of applicant	0	
Number of ballots marked against applicant		15

APPLICATIONS FOR CERTIFICATION WITHDRAWN

0690-82-R: Versafood Services Ltd., (Heritage Div.), (Applicant) v. H.R.E.W. Local 254, (Respondent).

0738-82-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Municipality of Jaffray-Melick, (Respondent) v. Canadian Union of Public Employees, (Intervener).

0822-82-R: Service Employees Union, Local 204 Affiliated with the AF of L, CIO, CLC, (Applicant) v. Modern Building Cleaning, Division of Dustbane Enterprises Limited, (Respondent).

0856-82-R: Service Employees Union, Local 204 affiliated with the AF of L, CIO, CLC, (Applicant) v. The Runnymede Hospital, (Respondent).

0867-82-R: United Food and Commercial Workers International Union, Local 1000A, (Applicant) v. Maher Inc., (Respondent).

0869-82-R: Labourers' International Union of North America, Local 183, (Applicant) v. Parkview Property Management, (Respondent).

0876-82-R: The General Workers Union, Local 1030 of the U.B.C. and J. of A., (Applicant) v. Jean-Claude Bergeron Inc., (Respondent).

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0771-82-R: Service Employees' International Union, Local 183, A.F.L., C.I.O., C.L.C., (Applicant) v. Cynthia Fraser-Palmer and Allistair Fraser-Palmer, c.o.b. as "The Gallery Dining Room" and Pannel Holdings Ltd., c.o.b. as "The Fireside Inn", (Respondents). (*Withdrawn*).

SALE OF A BUSINESS

2714-81-R: International Beverage Dispensers' and Bartenders' Union, Local 280, (Applicant) v. Vivace Tavern Inc., (Respondent). *Granted*.

0772-82-R: Service Employees' International Union, Local 183, A.F.L., C.I.O., C.L.C., (Applicant) v. Cynthia Fraser-Palmer and Allistair Fraser-Palmer, c.o.b. as "The Gallery Dining Room", (Respondent). (*Withdrawn*).

0828-82-R: United Rubber, Cork, Linoleum and Plastic Worker of America, AFL, CIO, CLC and its Local 1090, (Applicant) v. Carrying Industries Limited, (Respondent). (*Withdrawn*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2321-81-R: A. Da Cunha and others, (Applicants) v. Hotel, Restaurant and Cafeteria Employees Union, Local 75, (Respondent) v. Canadian Pacific Hotels Limited (Chateau Flight Kitchen), (Intervener) v. Group of Employees, (Objectors).

Unit: "all employees of Canadian Pacific Hotels Limited (Chateau Flight Kitchen) Malton, Ontario covered by the respondent's collective agreement which expired January 31, 1982, as listed in Schedule "A" to that agreement on the date hereof, who do not voluntarily terminate their employment or who are not discharged for cause." (*Dismissed*).

Number of names of persons on revised voters' list		146
Number of persons who cast ballots	109	
Number of spoiled ballots		6
Number of ballots marked in favour of respondent		52
Number of ballots marked against respondent		51

0113-82-R: Douglas C. Heino and Duane D. Reynard, (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local 1669, (Respondent) V.T.E. Leroux Contracting Ltd., (Intervener). (*Dismissed*).

0314-82-R: Joseph Appleman, (Applicant) v. Shopmen's Local Union No. 834 of the International Association of Bridge, Structural and Ornamental Iron Workers, (Respondent) v. Empco-Fab Ltd., (Intervener). (*Dismissed*).

0498-82-R: Mike Georgilopoulos, (Applicant) v. Hotel, Restaurant and Cafeteria Employees Union, Local 75, Toronto, of the Hotel and Restaurant Employees' and Bartenders International Union (A.F.L.-C.I.O.-C.L.C.), (Respondent) v. Diana Sweets Ltd., (Intervener).

Unit #1: "all employees of Diana Sweets Ltd. at Scarborough Town Centre, save and except head chef, hostess, those above the rank of head chef and hostess, office staff, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period." (*Granted*).

Number of persons on list as originally prepared		23
Number of persons who cast ballots	16	
Number of ballots marked in favour of respondent		4
Number of ballots marked against respondent		12

Unit #2: "all employees of Diana Sweets Ltd. at Scarborough Town Centre regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period, save and except head chef, hostess, those above the rank of head chef and hostess, and office staff." (*Granted*).

Number of names of persons on list as originally prepared		23
Number of persons who cast ballots	16	
Number of ballots marked in favour of respondent		4
Number of ballots marked against respondent		12

0634-82-R: Tony Perruzza, (Applicant) v. Teamsters Local Union No. 419, (Respondent) v. Consumers Distributing Company Limited, (Intervener). (*Granted*).

0671-82-R: Versafood Services Ltd. (Villa Maria), (Applicant) v. B.S.E.U. Local 210, (Respondent). (*Withdrawn*).

0687-82-R: VS Services Ltd., (Applicant) v. Service Employees Union, Local 478, (Respondent). (*Withdrawn*).

0688-82-R: Vendomatic Services Limited, (Applicant) v. Teamsters, Local 647, (Respondent). (*Withdrawn*).

0689-82R: VS Services Ltd., (Applicant) v. Retail Clerks Union, Local 206, (Respondent). (*Withdrawn*).

0691-82-R: VS Services Ltd., (Applicant) v. C.U.P.E., Local 1565, (Respondent). (*Withdrawn*).

0725-82-R: Louis Cossette, (Applicant) v. The International Union of Electrical, Radio and Machine Workers Local 547, (Respondent). (*Granted*).

0754-82-R: John Vande Kuyt, (Applicant) v. United Steelworkers of America, (Respondent) v. Contractors Machinery & Equipment, Division of Kidde Canada Limited, (Intervener). (*Granted*).

0814-82-R: Trimarine Canada Limited, (Applicant) v. Amalgamated Clothing & Textile Workers Union, AFL-CIO-CLC, (Respondent). (*Granted*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

0923-82-U: Brock Containers Limited, (Applicant) v. Canadian Paperworkers Union, Local 1196, (Respondent). (*Withdrawn*).

0924-82-U: Brock Containers Limited, (Applicant) v. Persons Listed on Appendix "A", (Respondents). (*Withdrawn*).

0925-82-U: Brock Containers Limited, (Applicant) v. Canadian Paperworkers Union, (Respondent). (*Withdrawn*).

0926-82-U: Brock Containers Limited, (Applicant) v. Employees of the Applicant Listed on Appendix "A" and Others, (Respondents). (*Withdrawn*).

0927-82-U: Brock Containers Limited, (Applicant) v. International Woodworkers of America, (Respondent). (*Withdrawn*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE – CONSTRUCTION INDUSTRY –

0804-82-U: M & J Electric Ltd., (Applicant) v. International Brotherhood of Electrical Workers, Local 353, Morley Hughes, Walter McCallum et al, (Respondent). (*Withdrawn*).

0901-82-U: Mechanical Contractors Association of Ontario, (Applicant) v. S. I. Guttman Ltd., United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 and W. C. Howard, (Respondents). (*Withdrawn*).

0953-82-U: Wm. Parker Construction Limited, (Applicant) v. International Union of Operating Engineers, Local 793, United Brotherhood of Carpenters and Joiners of America, Local 397, Labourers' International Union of North America, Local 597, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 463, Harry Duggan, Chris Burroughs, Mike Lloyd, Will Leggette et al, (Respondents). (*Withdrawn*).

0974-82-U: Sutherland-Schultz Ltd., (Applicant) v. The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 527, Jack Porter and Tom Crystal, Robert Watson et al, (Respondents). (*Withdrawn*).

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2624-81-U: Tim Reay, (Complainant) v. Arthur E. Moore and Sheet Metal Workers' International Association, (Respondents). (*Dismissed*).

2648-81-U: Teamsters Local Union No. 879, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Provincial Sanitation Services Ltd., (Respondent). *(Withdrawn)*.

2738-81-U: Hotel, Restaurant & Cafeteria Employees Union, Local 75, (Complainant) v. Lord Stanley's Tavern, Owned and operated by City Restaurants Canada, A Division of Citicom Inc., (Respondent). *(Withdrawn)*.

0043-82-U: David See-Wai Wu, (Complainant) v. Canadian Union of Public Employees Local 1692, (Respondent) v. North York General Hospital (Intervener). *(Granted)*.

0184-82-U: Canadian Guards Association – Local 107, (Complainant) v. Falconbridge Nickel Mines Limited, (Respondent). *(Withdrawn)*.

0219-82-U: Bakery, Confectionary & Tobacco Workers International Union, AFL-CIO-CLC, Local 264, (Complainant) v. Mr. Millers Ovens Inc., (Respondent). *(Withdrawn)*.

0467-82-U: Douglas Stanley – Allen McDonald, (Complainant) v. United Food and Commercial Workers International Union, (Respondent). *(Withdrawn)*.

0525-82-U: George Papadamous, (Applicant) v. Canadian Union of Operating Engineers & General Workers Local 101, (Respondent) v. Silverwood Dairies, a Division of Silverwood Industries Limited, (Intervener). *(Dismissed)*.

0526-82-U: Ken MacDonald, (Complainant) v. O.P.S.E.U., (Respondent). *(Withdrawn)*.

0552-82-U: Gerald Lorable, (Complainant) v. International Operating Engineers Union Local 793 – Toronto, (Respondent). *(Withdrawn)*.

0614-82-U: United Steelworkers of America, (Applicant) v. Lilo-Rail of Canada Limited and Modern Plating Company Limited, (Respondent) v. Group of Employees, (Objectors). *(Withdrawn)*.

0632-82-U: Thomas G. Just, (Complainant) v. York University Staff Association, (Respondent) v. York University, (Intervener). *(Dismissed)*.

0635-82-U: Canadian Paperworkers Union, (Complainant) v. Green Cedar Lumber Co., (Respondent). *(Granted)*.

0651-82-U: Margaret Ann Kvasnicka, (Complainant) v. Central Hospital, (Respondent). *(Withdrawn)*.

0653-82-U: D. Stanley & A. McDonald, (Complainants) v. Robson-Lang Leather Limited, (Respondent). *(Withdrawn)*.

0679-82-U: Canadian Union of Public Employees, (Complainant) v. River Glen Haven Nursing Home and owner Tom Kannampuzha, (Respondent). *(Dismissed)*.

0699-82-U: Service Employees International Union, Local 183, AFL-CIO-CLC, (Complainant) v. Gardiner's I.G.A. Store, (Respondent). *(Withdrawn)*.

0706-82-U: Professional and Clerical Workers of Canada, (Complainant) v. Canadian Union of Operating Engineers and General Workers, Local 111, (Respondent), *(Withdrawn)*.

0728-82-U: United Food & Commerical Workers International Union, AFL-CIO-CLC, (Complainant) v. Coey Metal Products Ltd., (Respondent). *(Withdrawn)*.

0730-82-U: Service Employees International Union, Local 183, (Complainant) v. E. J. McQuigge Lodge, (Respondent). *(Withdrawn)*.

0742-82-U: Retail Clerks Union Local 409 chartered by the United Food & Commercial Workers International Union, (Complainant) v. United Security Limited, (Respondent). *(Withdrawn)*.

0755-82-U: Antonio Valente, (Complainant) v. Local 247 of the Labourers' International Union of North America, (Respondent). *(Withdrawn)*.

0757-82-U: Lynda Cruickshank, (Complainant) v. Wilfred Chretien, Business Representative United Brotherhood of Carpenters and Joiners of America – Local Union 93, (Respondent). *(Withdrawn)*.

0769-82-U: Ontario Public Service Employees Union, (Applicant) v. Safeco Insurance Company of America, (Respondent). *(Withdrawn)*.

0780-82-U: Mechanical Contractors Association Ontario, (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 463, All-Pro Contractors, Chris Burrows, Peter Christy, Regional Mechanical Services, and 375253 Ontario Limited, (Respondents). *(Granted)*.

0781-82-U: Labourers' International Union of North America, Local 183, (Complainant) v. Peel Condominium Corporation No. 115, (Respondent). *(Withdrawn)*.

0782-82-U: United Food and Commercial Workers' International Union, AFL, CIO, CLC, (Complainant) v. Primo Importing and Distributing Company Limited, (Respondent). *(Withdrawn)*.

0800-82-U: Ontario Sheet Metal and Air Handling Group, (Complainant) v. L & C Sheet Metal Reg'd., (Respondent). *(Granted)*.

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1109-82-R; 1128-82-R Teamsters Union Local 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Applicant, v. **Alltour Marketing Support Services Limited**, Respondent

Bargaining Unit – Dependent Contractor – Employee – Practice and Procedure – “Brokers” having delivery functions – Using own vehicles or public transportation – Whether having community of interest with respondent’s drivers – Parties agreeing that brokers “employees” – Board not giving opinion whether “dependent contractors” – Deciding unit on basis of lack of community of interest

BEFORE: M. G. Mitchnick, Vice-Chairman, and Board Members J. Wilson and C. A. Ballentine.

APPEARANCES: *Ken Petryshen and Jim O'Donnell for the applicant; G. Grossman and L. Robinson for the respondent.*

DECISION OF THE BOARD; October 15, 1982

1. These are two consolidated applications for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. There is no dispute that at least the “warehouse foreman” forms a part of the management of the respondent, and accordingly, the parties may be said to have reached partial agreement on the appropriateness of the following bargaining unit:

All employees of the respondent in Mississauga, save and except warehouse foremen, persons above the rank of warehouse foreman, office and sales staff, persons regularly employed for not more than twenty-four hours per week, and students employed during the school vacation period.

The applicant takes the position that the “managerial” exclusion ought to proceed one level further; that is, that “assistant warehouse foreman”, and persons above *that* rank ought not to form part of the bargaining unit. The applicant points to B. Fagel as the “assistant warehouse manager” it has in mind. The respondent takes the position that it does not have an “assistant warehouse manager”, and that Mr. Fagel is simply a driver included within the appropriate bargaining unit. The applicant takes the position that C. Alarie, G. Moss, and P. Pento also exercise “managerial functions”, and ought to be excluded from the bargaining unit. The applicant adds that Mr. Moss ought to be excluded from the bargaining unit in any event, as is the case with respect to M. Doherty, on the grounds that these two individuals working in the dispatch office would fall into the exclusionary category of “office and sales staff”. The respondent takes the position that all of the above-named persons are properly included within the bargaining unit.

4. The Board ruled at the hearing that sufficient factual and material disputes existed between the parties to justify the appointment of a Labour Relations Officer with respect to these individuals. The Board accordingly appoints an Officer to inquire into and report to the Board on the duties and responsibilities of B. Fagel, C. Alarie, G. Moss, P. Pento and M. Doherty.

5. The Board also entertained at the hearing the statements of fact and representations of respective counsel with respect to the inclusion or exclusion of the persons who carry out deliveries for the "Speed Service" division of the respondent's operation. There is no dispute over the fact that these individuals fall within the broad definition of "employees" under the *Labour Relations Act*. Indeed, the respondent employer takes the position that they are persons who properly fall within the scope of the appropriate bargaining unit. The applicant, however, takes the position that these "employees" are truly "dependent contractors", and that they, therefore, are not properly included within the present bargaining unit, unless the majority of them elect to be so. Alternatively, the applicant argues that the same attributes which make these individuals fit the definition of "dependent contractor" under the Act give them a community of interest sufficiently distinct from the bargaining unit it has sought to organize as to justify their exclusion in any event.

6. Comparing the submissions of both parties, the Board finds sufficient commonality on the facts which are material to enable the Board to dispose of this issue without the further assistance of a Labour Relations Officer. The respondent is essentially engaged in the warehousing and delivery of travel documents to the various agencies of the travel industry. The operation has two branches. One consists of regular "runs" to customers on a daily basis, and the other consists of responding to rush orders from customers on an as-requested basis. The latter branch is the "Speed Service" operation which is now in dispute. The company has a president, Mr. Robinson, and a general manager, Mr. Doherty. The "regular run" branch receives its directions from and is supervised by the warehouse foreman, Mr. Mason. The Speed Service operation has its own supervisor, Mr. Connolly, and operates through the dispatch office housing Mr. Connolly as well as Mr. Moss and Ms. Doherty, the two "dispatchers" also in dispute. Both Mr. Connolly and Mr. Mason report to Mr. Doherty, the general manager. It is agreed that the individuals who perform the driving function for the first branch of the company's operations, that is, the regular route-drivers, are employees falling within the appropriate bargaining unit of the applicant. These were referred to in argument as the "company drivers". They drive vehicles belonging to the company, either cars, trucks, or vans, and these vehicles have the company's name printed on the side. They report with their vehicles to be loaded at the warehouse dock each morning at approximately 7:00 a.m. The loading is performed in conjunction with the warehouse crew (which form part of the applicant's bargaining unit). Company drivers are generally on the road by 8:30 at the latest. It is understood that when they complete their daily run, they are free to go home. They are paid by salary, and of course are subject to the normal payroll deductions. They have neither lockers nor locker room at the respondent's facility, as they are present there only for loading in the morning.

7. By comparison, the individuals performing delivery functions for the Speed Service operation are required to provide, entirely at their own expense, their own mode of transportation. In this regard, the bulk of these individuals employ their own

automobile, bearing no insignia of the company. Two of these delivery personnel carry out their function by way of public transit, using a Metro pass which they purchase themselves. The applicant refers to the Speed Service group as “brokers”. All of these individuals report to the company’s dispatch office each morning, generally between 8:30 and 9:00 a.m. Once sent out on a call, they either remain in their area for a further order, or return to the dispatch office. They receive no salary or hourly rate, but rather split the customer’s fee with the respondent company on a 60/40 basis (the “broker” keeps the “60”). The company makes no deductions whatever from these commission payments. The “brokers” generally report in the morning to an area different from that of the “company drivers”, being a side door through which the “brokers” have access to the dispatch office. They are required to report to the warehouse dock for loading only on isolated occasions. As with the “company drivers”, the “brokers” have no need for lockers or a locker room at the respondent’s premises.

8. Considering the above facts, the Board finds it unnecessary to render an opinion on the applicant’s argument that the members of the Speed Service operation are “dependent contractors”. The Legislature in 1975 introduced into the *Labour Relations Act* the concept of a “dependent contractor” as follows:

“Dependent contractor” means a person, whether or not employed under a contract of employment, and whether or not furnishing his own tools, vehicles, equipment machinery, material, or any other thing, who performs work or services for another person for compensation or reward on such terms and conditions that he is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor.

In doing so, the Legislature was undoubtedly turning its mind to the situation where an individual is contended to be an independent contractor, and hence not an “employee” for the purposes of the Act. Where, as here, it is common ground that the persons in dispute are in fact “employees”, it is questionable whether the test of “dependent contractor” as set out in the statute really has any probative value. While the individuals in question here do exhibit attributes of the persons found to be “dependent contractors” in other cases of the Board, those cases were decided in the context of the normal independent versus dependent-contractor inquiry. See, e.g. *Mount Nemo Truckers Association*, [1977] OLRB Rep. Feb 104, at paragraphs 12 and 13. In its treatment of these “dependent contractors”, however, the Legislature does appear to recognize the distinct community of interest from “traditional” employees which these special attributes tend to produce. In particular, the legislation in section 6(5) makes provision for a separate bargaining unit of dependent contractors only, unless a majority of such contractors determine otherwise. The Board finds that the present case can be decided on the basis of community of interest as well.

9. The respondent employer points to the fact that both groups of employees work roughly the same hours and out of the same location, service generally the same industry and geographic area, and are subject to the same general manager in terms of ultimate responsibility and authority for formal discipline. From this the respondent argues that the Speed Service employees are “just another department of the company”.

Were the Board to arrive at the same conclusion, it would indeed be reluctant to split Speed Service employees off from other employees of the company. For the Board's policy in this regard, see *Westeel-Roscoe Limited*, [1979] OLRB Rep. Nov. 1125, especially at paragraph 10. The Board does not conclude, however, that these employees are "just another department of the company". Rather, the Board finds the Speed Service employees, or "brokers", to be in a fundamentally different working relationship with the company than are the drivers which service the other branch of the company's operations. The whole emphasis of bargaining priorities of the "brokers", who derive their income in the form of commissions from the use of their own vehicles or other mode of transportation, is likely to be significantly different than that of the drivers who stand in the traditional employment relationship with the company. In addition, the whole structure of the Speed Service employees' working day is different from that of the company drivers. The direct supervision and instruction for the two groups are entirely unrelated, and there is not the slightest degree of functional interchange between the two branches of employees, apart from the isolated occasions on which the Speed Service driver is required to report to the warehouse dock for loading. Indeed, the difference in starting times, quite apart from the difference in normal reporting areas, virtually ensures that the drivers from the two types of operations will rarely meet. On all the facts, there simply is no compelling reason for the Board to depart from the pattern of organizing adopted by the applicant and its supporters in this campaign. In *K-Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250, e.g., the Board observed at paragraph 18:

... the Board recognizes that there may be more than one appropriate unit in any given case. Where there is more than one appropriate unit, the Board will attempt to accommodate the desire of the employees on whose behalf the application has been filed to bargain collectively. It follows that in doing so the Board takes into account the pattern of organization.

In the present case, it is questionable whether the combining of both branches of the respondent's operation would be found, on a contested basis, to be an appropriate unit in any event.

11. On the basis of the foregoing, the Board finds that the nine delivery persons staffing the respondent's Speed Service operation are to be excluded from the bargaining unit sought by the applicant. Further processing of this application will await the report of the Labour Relations Officer referred to in paragraph 4.

1447-80-R United Steelworkers of America, Applicant, v. Baltimore Aircoil Interamerican Corporation, Respondent, v. Group of Employees, Objectors

Certification – Petition – Practice and Procedure – Divisional Court remitting matter for de novo hearing – Employees told that lawyer’s name suggested by employer – Petition not reliable as voluntary – Board setting out approach in face of voluntary petition and voluntary counter-petition

BEFORE: George W. Adams, Q.C., Chairman, and Board Members Gordon Bourne and Henry Kobryn.

APPEARANCES: *Brian Shell and Ron Varley for the applicant; Michael Gordon, Thomas Stefanik and Richard Hampton for the respondent; and Reginald Leyte, Edward Davis and Joseph Lamoureux for the Group of Employees.*

DECISION OF GEORGE W. ADAMS, Q.C., AND HENRY KOBRYN: October 22, 1982

1. This is an application for certification. It was filed on October 9th, 1980 and given a terminal date of October 23rd, 1980. The matter came on for hearing on October 31st, 1980 and by decision dated November 25th, 1980 a certificate was issued to the applicant for a bargaining unit described as “All employees of the respondent in the Town of Halton Hills, save and except forepersons, persons above the rank of foreperson, office and sales staff and students employed during the school vacation period”. In arriving at that decision the Board had been confronted with a statement of desire in opposition to the application signed by a number of employees in the bargaining unit. Three of the employees who signed the statement had previously become members of the applicant union. The applicant had filed evidence of membership on behalf of thirty of the fifty-four employees in the bargaining unit and, within the terminal date, filed a further document signed by a number of employees reaffirming their membership in the applicant and repudiating their signatures on the statement of desire. Among those signing this document or counter-petition were the three union members who had earlier signed the statement of desire in opposition to the applicant.

• • •

3. The Board heard evidence concerning the circumstances under which the document reaffirming membership in the applicant came to be signed and was satisfied it was voluntarily executed by those signing it. In the circumstances, the Board indicated it was prepared to disregard the signatures of the three union members on the statement of desire in opposition to the application. Having arrived at this decision, the Board accepted the thirty applications for membership filed by the applicant on behalf of bargaining unit employees as an accurate expression of the wishes of those thirty employees. Thus, because the trade union had support of more than fifty-five percent of the employees in the bargaining unit, the Board concluded that the applicant was entitled to automatic certification unless the Board decided to exercise its discretion under section 7(3) of the Act to direct the taking of a representation vote and the Board

concluded that no basis, in its view, existed to cause it to direct the taking of a vote. A certificate was therefore issued to the applicant.

4. The respondent employer challenged that decision in the Divisional Court of the Supreme Court of Ontario and was joined in that challenge by a group of objecting employees. The basis to the challenge was the Board's refusal to inquire into the origination and circulation of the statement of desire in opposition to the application after having found that the so-called "counter-petition" filed by the applicant confirming the membership and repudiating the three relevant signatures on the statement of desire was voluntary. In quashing the Board's decision the Divisional Court wrote:

In this case had there been no counter-petition it would obviously have been appropriate for the Board to test the petition in accordance with the Rule for it threw the Union's claim to 30 members open to question. It was clearly the existence of the counter-petition that led the Board to refrain from making the inquiry. The Board simply accepted the evidence of Mr. Varley. The constraints which the certification process places upon the calling of evidence, constraints intended to preserve the anonymity of Union members, left counsel for the objectors at the hearing in an awkward situation. He could not call evidence to counter Mr. Varley's. His only prospect of calling into question the effectiveness of the counter-petition was to balance the process of the creation of the petition. That the Board would not let him do.

With respect, we think the Board erred. The mere fact that three persons had apparently been of three minds about membership, first, to join, second to repudiate, third to repudiate the repudiation, might, in our view, have been sufficient evidence of confusion to justify a vote being ordered or, at least, an inquiry into all the circumstances of the latter two changes of mind, the first, of course, being beyond overt inquiry. In addition, however, there was clear evidence that peer-pressure might have been an element in the creation of the counter-petition. If that had not induced the Board to order a vote it might, at least, have led it to be curious about the presence or absence of such influences in respect of the petition.

It is not that the Board refused to exercise its discretion to order a vote that is under attack, it is its exercise of that discretion in the absence of evidence relevant to it.

We are of opinion that the Board erred and that its error was not merely one of the admission of evidence and therefore within jurisdiction. The difference between that kind of error and an error of jurisdiction has been canvassed in many decisions, one of the most recent of which was that of the Divisional Court in *Re Marques et al. v. Dylex Ltd. et al.* 81 D.L.R. (3d) 554. The effect of those decisions which include, notably, *Re Ontario Labour Relations Board: Toronto Newspaper Guild v. Globe Publishing Co.*, [1953] 2 S.C.R. 18 and *R. v. Marsham*, [1892] 1 Q.B. 371, is that where the

wrongful refusal was in respect of the very subject matter into which the tribunal was bound to inquire the error was a jurisdictional error. We have already said that in our opinion the Board should not have refused evidence concerning membership since that was the very subject it was obliged to decide. Its refusal, therefore, is an error of jurisdiction.

Viewing the matter from another vantage point, the refusal was a denial of jurisdiction and a denial of natural justice in light of the Board's obligation, under section 91(12) of the Act to give the parties a full opportunity to be heard: see *Re Fisher et al. and Hotels, Clubs, Restaurants, Tavern Employees' Union, Local 261 et al.* (1980) 28 O.R. (2d) 462.

If this were an isolated incident it might not have been thought appropriate for the intervention of this Court but since the Board, according to the notes, was apparently following an established practice in refusing to hear evidence of a petition where it accepted a counter-petition the situation involves a serious error of law that requires correction: see *Re Hughes Boat Works Inc. and International Union, United Automobile, Aerospace, Agricultural and Implement Workers of America (UAW) Local 1620, et al.* 26 O.R. (2d) 420 and *Re Tandy Electronics Ltd. and United Steelworkers of America et al.*, 30 O.R. (2d) 29,

5. The Court of Appeal dismissed an appeal from the decision of the Divisional Court and Mr. Justice Jessup endorsed the Record in the following manner:

While the Board exercises a very broad discretion in ordering a certification vote or not, in our view in this case it denied natural justice in refusing to hear the evidence sought to be adduced by the objectors without knowing what the evidence was and such denial went to jurisdiction. In the result the appeal is dismissed with costs.

6. The decision of the Court of Appeal was dated December 16th, 1981. The order of the Divisional Court affirmed by the Court of Appeal remitted "the application for certification and all it comprises, less the decision and certificate, to another panel of the Board for consideration de novo in the light of this decision". Accordingly, the matter returned for hearing before this panel of the Board on September 8th, 1982.

7. The Board finds the applicant is a trade union within the meaning of section 1(1)(n) of the *Labour Relations Act*.

8. The only issue separating the parties with respect to the description of the bargaining unit is its geographic scope. The applicant submits that the unit should be described in terms of Halton Hills, whereas the respondent contends that the term Georgetown should be employed. Pursuant to section 2(1)(d) of the *Regional Municipality of Halton Act, 1973* the Town of Georgetown became part of a new municipality known as the Town of North Halton, which name was subsequently changed to the Town of Halton Hills by force of Ontario Regulation that is O. Reg. 622/72. The Board's general practice is to describe bargaining units by reference to the relevant

municipality, and we propose to follow this policy in the instant case. Accordingly, the bargaining unit will be described in terms of the Town of Halton Hills.

9. Having regard to the Board's determination set out above and the agreement of the parties with respect to all issues relevant to the description of the bargaining unit, the Board finds that all employees of the respondent in the Town of Halton Hills, save and except forepersons, person above the rank of foreperson, office and sales staff and students employed during the school vacation period constitute a unit of employees of the respondent appropriate for collective bargaining.

10. On the date of making of the application, there were fifty-four employees in the bargaining unit. By the terminal date, the applicant filed for thirty employees combination applications for membership in the United Steelworkers of America and receipts for the payment of \$1.00 on account of initiation fees paid to that trade union. Each membership card bears the signature of the applicant employee and the signature of the sole collector, Ronald Varley, together with the date of application. Also filed was the required Declaration Concerning Membership Documents (Form 9) signed by Mr. Gerry Reads of the union declaring the propriety of the documentary evidence of membership filed.

11. There was filed a statement of desire in opposition to the application signed by a number of employees in the bargaining unit and filed with the Board before the terminal date. Three of the employees who signed the statement had previously become members of the applicant union. The statement of desire contained twenty-six signatures in total together with witness signatures and indications of the location at which and date on which each subscribing signature was obtained. The preamble to the statement of desire reads:

We the undersigned employees of Baltimore Aircoil and P.A.C.O. Pumps, do not wish to be represented by the United Steelworkers.

12. The Board also received, on the terminal date, a document signed by thirty employees reaffirming their membership in the applicant and repudiating their signatures on the statement of desire. Among those signing this document were the three union members who had earlier signed the statement of desire in opposition to the application. The preamble to this document reads:

PETITION FORM TO THE O.L.R.B.

THE REGISTRAR
ONTARIO LABOUR RELATIONS BOARD
400 UNIVERSITY AVE.,
TORONTO

DEAR SIR:

RE FILE #1447-80-R

I/WE THE UNDERSIGNED HEBY REAFFIRM MY/OUR MEMBERSHIP IN THE UNITED STEELWORKERS OF AMERICA

AND I/WE REPUDIATE MY/OUR SIGNATURE ON A PETITION AGAINST THE UNION.

SIGNATURE

DATE

WITNESS

13. The respondent company objected to the Board hearing any evidence with respect to the document reaffirming membership in the applicant on the basis that the Rules of Procedure of the Board nowhere contemplate such documents and that therefore they can have no legal affect. The Board reserved its ruling on this submission and heard evidence concerning the circumstances under which the document reaffirming membership in the applicant came to be signed. The applicant trade union at the conclusion of the tendering of this evidence submitted that the Board need not hear evidence concerning the origination and circulation of the statement of desire in that the applicant was prepared to make submissions on the basis that both the statement of desire and the document reaffirming membership in the applicant were voluntary expressions of employee wishes at the time they were executed. The objectors seemed prepared to accept this approach. However, having regard to the fact that the objectors were not represented by legal counsel and to certain comments of the Divisional Court in its decision in this matter, the Board agreed with the suggestions of the employer's counsel that the origination and circulation of the statement of desire ought also to be enquired into. A full review of the evidence with respect to each document will be undertaken.

The Counter-Petition

14. Mr. Ron Varley was the primary organizer for the applicant trade union. He is employed as a meat cutter with Dominion Stores in Windsor and is represented by the applicant in his employment there. He has been a local trade union president for fourteen of his seventeen years with Dominion Stores and has been Vice-President of the Windsor District Labour Council. He had been working for the Steelworkers on a part-time basis in the capacity of organizer for about a year and a half prior to the instant organizing campaign and in that time had been involved in three previous organizing campaigns. His previous experience also includes organizer for a political party in five different provinces. He described the origination and circulation of what, in Board practice, has come to be known as the counter-petition. He testified that the form used by himself and his colleague, Everett Roberts, is a standard form counter-petition available from the United Steelworkers Union of America. He said he obtained copies of the form from the trade union's district office on Lombard Street. He testified that all of the people who had signed membership cards in the applicant were invited to a meeting to be held on October 21st, 1980. They were invited by telephone and told that the organizers (Varley and Roberts) would be updating them on what was to happen at the Ontario Labour Relations Board. The meeting was convened at a motel located on the outskirts of Georgetown on Highway #7. The meeting began at 7:00 P.M. and Varley chaired the meeting. He talked about the application, what procedures would be followed, what was the applicant's hopes, and what would follow if the application was successful in terms of collective bargaining. Questions were then entertained from the floor. It has been the practice of Roberts and himself to rely on a counter-petition in that it cannot harm an application and can "neutralize" any statement of desire or employee petition which may have been circulated and of which they might have no knowledge. Indeed, in this particular case Varley and Roberts had been informed of the circulation of an employee petition.

15. Varley explained the significance of any overlap between membership cards and signatures on the statement of desire. He explained that one possible way to respond to the effect of signatures on a statement of desire was by the circulation and adoption of a counter-petition which would, in effect, "nullify" any overlap between the statement of desire or petition and the applications for membership in the applicant. Neither he nor Roberts asked the employees present who had signed the petition. Everyone but one employee who had executed membership evidence attended the meeting. Varley admitted that he and Roberts had received some information suggesting who may have signed the statement of desire. Indeed, two people had volunteered to Varley that they signed this petition to prevent the company from knowing they had supported the trade union and were relieved to know there was a way to show they were still committed to the applicant trade union.

16. The motel room was of ordinary size and, thus, was very crowded for the meeting. Varley asked the people present who were interested in signing the counter-petition to come forward and execute the document. The result was that everyone lined up and signed three pages of a commonly worded petition affirming membership in the United Steelworkers of America. All signatures were dated October 21st, 1980 and witnessed by Mr. Varley.

17. Twenty-nine of the thirty signatures were obtained in this way. The thirtieth signature was that of an employee who had been ill and unable to attend the meeting. Varley and Roberts after the meeting attended at his home and obtained his signature as described below. Varley denied that any of the employees were told that they "had" to attend the meeting or that employee signatures on the counter-petition constituted anything other than voluntary acts. He testified that anyone in the room was free to leave although he admitted that a refusal to sign would have been known to both him and Roberts.

18. The one employee who did not attend the meeting had advised Varley by telephone that he was not feeling well and would not be there. However, he asked that Varley and Roberts "fill him in afterwards". In attending at this person's house Varley used a blank counter-petition form so the person would not be able to examine all the names of those who had already signed. His wife came to the door and indicated that her husband was not feeling well. Varley told her the purpose of the visit and that her husband was expecting them. The man was in slippers and a dressing gown. Varley indicated that he looked as if he had not been feeling well. Varley brought him up to date on the earlier meeting with the other employees. According to Varley, this individual knew about the petition that had been circulated against the union and Varley advised him about the purpose of a counter-petition and asked if he wanted to sign it. The employee indicated that he did. The employee's wife made coffee for everyone. Roberts witnessed the employee's signature and the visit concluded after some small talk and the consumption of the coffee. Varley suspected that this person had signed the statement of desire although this was never indicated to Varley and Roberts. Varley denied asking the employee whether he had signed the statement of desire or telling him that his signature would make the difference to the applicant and those supporting it. He said that the employee was told that his signature was as important as any other signature but they did not make his signature any more critical than anyone else's. On cross-examination he indicated that his recollection of this specific conversation might

be faulty because of the passage of time and that he may have indicated that the employee's signature was critical.

19. The meeting at the motel ended somewhere around 8:00 p.m. and the visit at the employee's home was somewhere in the vicinity of 8:30 to 8:45 p.m.

20. In order to understand the policy behind the Steelworkers standard form counter-petition, the Board asked for Mr. Varley's opinion on why employees would sign a membership card, then a statement of desire, and then a counter-statement reaffirming their support for a trade union, all within a relatively short period of time. Varley believed that many people signed a petition or statement of desire out of fear that an employer will come to know of their support for a trade union should they refuse to sign the document and that the counter-petition provides these employees with an opportunity to confirm their true wishes. Indeed, he began by giving the example of at least two employees in the instant matter who indicated to him that this was their motivation. On cross-examination he testified that the petitions he had seen over his experience had been "company petitions". On the other hand, he agreed with the respondent's counsel that "at least in the old days" people may have signed counter-petitions out of fear. However, he could see no basis for such fear in the instant case and testified that he did not believe the last person who signed did so out of pressure in that he was a former trade union steward and member of the Steelworkers in another plant.

21. Everett Roberts testified and essentially confirmed Mr. Varley's description of events surrounding the counter-petition. He is employed with Peelle Company Ltd., in Malton, Ontario and is a member of the Steelworkers Union. He has been president of his local trade union for the past three years. He was involved in the organizing campaign at the respondent company and worked under the direction of Ron Varley and a Mary Shane. Apparently Mary Shane became ill during the campaign and subsequently passed away. This was his first organizing campaign. He produced a check list of considerations that Varley had written out for him to relate to employees he was calling to notify them of the October 21st meeting. The check list is numbered 1 to 5 and took the following form:

- (1) Important decision to be made;
- (2) Only those who signed cards present;
- (3) Urgent they be there;
- (4) Get indication if coming; and
- (5) Do not mention meeting at work – keep it a secret.

The postscript on the check list indicates "also make them feel responsible for being there!". Roberts had this check list in front of him as he spoke to each employee on the telephone. Only those who had signed cards were invited and telephoned. This was the same check list that was used to summon employees to an October 6th meeting. When the counter-petition was signed he was sitting at a table with Ron Varley and the

employees present lined up to sign the document. He saw Varley sign as a witness in each case. Neither he nor Varley attempted to keep track of who was leaving and who had signed. It was only after they had obtained the signatures of those at the meeting that they then visited the employee who was at home and too sick to attend. Roberts confirmed Varley's description of what was said at the employee's home. He and Varley suspected there were three "overlaps" but they had no definite knowledge of this. They were simply going on what certain persons had told them. Indeed, Roberts indicated that "to this day" he did not know for a fact who had signed both membership cards and the statement of desire. He confirmed that it is the practice of the United Steelworkers to circulate a counter-petition "just in case" a petition or statement of desire is going around. However, he denied that it is ever the practice to sign both membership cards and a counter-petition at the same time. The counter-petition appears to be left to the concluding meeting of every organizing campaign as close to the terminal date as possible. He agreed that the employee who was visited was told about the nature of a counter-petition and advised that "if the numbers were not there they would be into a vote situation". He denied that either Varely or he told the employee that his decision could decide the whole issue. He said that the employee did not advise them that he had signed a petition although Roberts had his own suspicions that the employee had done so.

The Petition

22. Mr. Richard Hampton, General Manager of the Georgetown plant for the last fifteen years, testified that he was aware of a union organizing attempt in the fall of 1980. He said he was aware of this because of leaflets being handed out at the entrance to the plant. He also indicated that there were rumours within the plant. He said it first came to his attention towards the end of September of 1980. His first reaction, according to his testimony, was to retain legal counsel to discuss the matter. From these discussions he was given to understand that he could do nothing and that he had to take a "hands-off position" with regard to the whole matter. He testified that at about this time or during the first week of October two employees, a Mr. Leyte and a Mr. Lamoureux, came to see him in the morning. He testified that they told him there was a union organizing attempt over which they were disturbed. They asked what they could do. He said he told them that to the best of his knowledge he could not speak to them about it and that the only thing to do was to go to a lawyer of their own choosing who could perhaps advise them. He said they left obviously disturbed at the situation. He then called his lawyer to confirm what he already knew and was told that he could advise the employees to contact the Registrar of the O.L.R.B. in an attempt to get a labour lawyer and that it was also proper for him to provide the employees with a list of labour lawyers with experience in the area. Thereafter, his solicitor delivered the following letter to him by courier. The letter is dated October 1st, 1980 and reads:

PERSONAL & CONFIDENTIAL

Richard J. Hampton, Esq.,
General Manager,
Baltimore Aircoil of Canada
35 Sinclair Avenue,
Georgetown, Ontario
L7G 1J3

Dear Mr. Hampton:

You have indicated to me that you have been approached by one or more of your employees who have asked you if you can recommend to them the name of a lawyer who might act for them in terms of proceedings before the Ontario Labour Relations Board or in relationship to matters arising out of an apparent organizing attempt at your plant in Georgetown.

You will recall that I advised you at the time that you could not give your employees any advice as to what they could or could not do in order to avoid being unionized and that it was improper for you to indicate to them any preferences that you might have on that subject.

You will further recall that I advised you that the only thing you could really do was to suggest to the employees that they contact:

"D. K. Aynsley, Esq.,
Registrar,
Ontario Labour Relations Board
400 University Avenue,
Toronto, Ontario

Telephone: 965-4151"

In the alternative it is not, in my view, improper for you to indicate to the employees that you are not able to give them advice and suggest that they retain counsel of their own choosing experienced in matters of this nature. You have indicated to me that you are unfamiliar with the names of any counsel who do this kind of work and I agreed to provide you with three names. The individuals in question, are as follows:

Michael G. Horan, Esq.,
Barrister and Solicitor,
Suite 401,
330 University Avenue,
Toronto, Ontario
M5G 1R9

Telephone: 598-2488

Hart Rossman, Esq.,
Barrister and Solicitor,
418 Richview Avenue,
Toronto, Ontario,

Telephone: 483-7574

Robin Cumine, Q.C.
Messrs, McLean, Lyons
Barristers and Solicitors,
Suite 372 Bay Street,
Toronto, Ontario
M5H 2X5

Telephone: 364-5371

In addition there is a most useful publication published by the Ministry of Labour entitled "A Guide to the Labour Relations Act". Copies of that publication are available, as I understand it, free of charge from the Ontario Labour Relations Board. I would suspect that the Registrar of the Board would be pleased to forward any of your employees a copy of that document should they request it.

I must reiterate, you cannot, in any circumstances, offer to assist your employees in opposition to the trade union nor should you allow yourself to be drawn into any conversations wherein you express an opinion or views which may indicate an "anti-union animus" on your part.

Should you have any questions arising out of the foregoing please do not hesitate to contact me.

Yours very truly,

Michael Gordon

23. Hampton testified that Mr. Leyte came back to see him later in that day and that he gave Mr. Leyte the names of the three lawyers contained in Exhibit 3. He confirmed to Leyte that he could have no involvement. He showed Leyte a copy of Exhibit 3 but did not give him a copy of the letter. He testified that to the best of his knowledge he did not talk to other employees about the union organizing attempt and if anyone tried to raise the matter with him he immediately closed the subject. He denied that he made any offer to Mr. Leyte with respect to absorbing the costs of retaining a lawyer. He testified that it was not unusual for employees to come to him and ask for help on a variety of matters in that he maintains an open-door policy. In fact, on one other occasion he had suggested that an employee see a lawyer with respect to a personal matter.

24. He testified that he did not keep track of what Mr. Leyte and his colleagues were doing and that he did not know that a lawyer had been retained until his attendance at the first meeting before the Board. He denied knowing that a statement of desire or petition was circulating in the plant although he admitted to knowing of rumours to this effect. On cross-examination he asserted that he tried to keep a hands-off position at all times and that he did not have discussions with employees or the workforce with respect to the company's position. He denied knowing that people were being approached by union organizers in September and did not recall issuing a letter to the workforce

expressing the views of the company on the organizing drive until shown a copy of Exhibit 4. On reading the following document he agreed that it was a letter sent to all employees on or about September 24th, 1980. The letter reads:

Dear Fellow Employees:

As you may know, some employees have recently been contacted by a union organizer about signing a representative card. I want to remind you of the seriousness of signing such a card and restate my feelings about why a union is not necessary here.

Our plant has recently completed its 17th year in Georgetown. During these years our plant has grown and is providing you with job security and employment. This has occurred without the intervention of a union.

Union organizers are not familiar to many of you. As you will recall, a little over a year ago a union tried to organize our plant. However, you as employees chose to continue the existing relationship with the company without outside representation. You voted "NO" to the union. I feel this reflects the fact that you have experienced good working conditions and received fair and competitive wages and benefits. We are also aware that improvements can almost always be made. It is and will be our policy to continue to maintain wages, fringe benefits and working conditions which are equal to or better than those in competitive businesses and make improvement where and when possible.

We respect the rights of our employees to join any organization, including a union. On this point, we wish to be very clear. Employees are entitled to join a union and likewise employees are also entitled not to join a union. No person representing a union or management is entitled to interfere with your rights in making that decision.

You may hear a great deal as you did with the previous union about what the unions say they can do for you. However, membership in a union also involves obligations. If you are considering signing a union card, you should carefully read the union's constitution and by-laws so you will understand what signing a union card means. For example, what are the initiation fees and dues? Are there any special assessments? Will joining a union involve you in fines, strikes, or picketing activities?

The union may promise you things such as improved wages and job security. Promises are easily made. However, any improvements promised by a union must be agreed on by the company. No union can guarantee anyone a job. Job security comes from a growing and healthy company.

You may be left with the impression that signing a union card is only the first step and that the vote will take place later. Be aware – if more than 55% of the eligible employees sign cards, the union is entitled to bargain for you automatically *without a vote*. Therefore, it is very important for you to be *well informed* before you sign a card.

The company is concerned about your welfare. You don't need to give up any freedom to unions and pay dues in order to retain your job security and good wages and benefits. It is our desire to remain non-union and deal with you as individuals, not through a third party.

We are not anti-union. We are pro-employees and have been for the 42 years that BAC has been in business. Unions have tried to organize other BAC plants in North America. In every instance, BAC employees have rejected the unions' attempts. I trust that all of our employees will give serious consideration to this important decision about signing a union card. Feel free to contact me if you need any further information.

Sincerely,

R.J. Hampton
General Manager

25. He testified that he issued this letter after learning of well substantiated rumours about a trade union organizing drive. But, he denied knowing of the circulation of a petition and denied instructing his staff with respect to the origination and circulation of the petition. He is on the shop floor three and four times a week and often talks with hourly rated employees and with his supervisors. Exhibit 4 could have been in response to information received on one of his shop floor outings. He could not recall whether his letter of September 25th also went to his supervisory staff, although he did not believe it did. He did speak to his supervisors about what they could and could not do in the context of an organizing drive and indicated that their position was to be a hands-off one. However, he agreed that they would be aware of the company's position being one of opposition to trade unions. BAC has some 1500 employees in North America and is a subsidiary of Merk Inc., a large American corporation. The head office of BAC is in Rahway, New Jersey.

26. Reginald Leyte was one of the objecting employees and testified in support of the origination and circulation of the statement of desire. He is employed by the respondent company in shipping and receiving and has been with the company for fourteen years. He testified that the United Steelworkers of America were signing up people to be represented and so he, Edward Davis and Joe Lamoureux decided "to get a petition going against the union". Around the end of September or early October before any posting of material from the Ontario Labour Relations Board had occurred, he and Joe Lamoureux went to the Plant Manager to see what they could do. The employees believed they needed help. Leyte recalled Mr. Hampton told him that although he could

not talk to them about the situation he would check with his solicitor. Shortly after Mr. Hampton gave him the names of three lawyers and he picked one of them, a Mr. Michael Horan, whose name appears on the top of the list of solicitors on Exhibit 3, a solicitor who often acts before this Board on behalf of objecting employees. M. Leyte testified that he got in contact with Mr. Horan on approximately October 2nd, 1980 and was told that there was nothing that could be done until the "Notice to Employees" went up from the Labour Relations Board and that as soon as that notice was posted he should call Mr. Horan. Soon after, a "green sheet" from the Board went up on notice boards and he called Mr. Horan who gave him the exact heading for the petitioners' statement of desire which was to be circulated.

27. Mr. Leyte was working days. He obtained the first three signatures including his own at coffee break on October 15th between 3:00 and 3:15 p.m. Employees were outside the plant on the lawn and he told them that the union was trying to organize and that if he obtained enough signatures on the petition it would cause a vote to be held in the shop. The employees were then asked whether they wanted to sign the petition. He, Davis and Lamoureux then got together after work and commenced visiting other people at their homes. #4 was obtained on October 15th at the employee's home at about 6:00 p.m. Leyte said that they knew who had signed cards and who were not yet decided. The employee was told that the union was organizing and that they were taking up a petition. He repeated his remarks about the effect of a petition causing a representation vote. #5 was visited at his home about 10 minutes later. Leyte testified that while all three employees travelled from home to home only one got out of the car and spoke to the employee whose signature was being solicited. The person designated to approach the employee was usually the one who knew the employee best. #6 was obtained at approximately 6:20 or 6:25 p.m. #16 was obtained at the employee's home on October 16th at about 5:45 p.m. #17 was obtained at about 6:15 p.m. on October 16th. #19 was obtained at his home on October 19th at 7:00 p.m. Throughout this process Leyte and his colleagues shielded the names of those who had signed the petition from those whom they were approaching. In shielding the names, however, the preamble to the petition was also covered and therefore very few employees if any actually read the preamble. However, Leyte testified that the employees were all told about the significance of the petition and what was the affect of signing. #22 was obtained in the parking lot in a nearby plaza in Georgetown on October 16th. #23 was also obtained in the same parking lot on the same evening. Employees who signed up in the parking lot had been told to meet there after work. #24 was signed up in the parking lot on October 16th. On this occasion the employees in the parking lot met essentially as a group. #25 was signed up at home immediately after work on October 20th as was #26. When the process was completed and 26 signatures obtained, Leyte took the petition to his solicitor. Mr. Horan forwarded the document to the Board.

28. On cross-examination by the respondent company's counsel, Leyte testified that he asked Mr. Hampton for the names of lawyers because he knew that he and his colleagues could not handle it. He denied that any other kind of assistance was given to him by the company. He had no other discussion with Hampton about the organizing campaign and told no one in supervision nor in the management of the company what he, Davis and Lamoureux were doing. He denied receiving any lists of employees from the company and testified that he and his colleagues located and approached employees from memory. On cross-examination by the applicant's counsel, Leyte testified that

most of the employees lived in the Georgetown, Orangeville, and Brampton areas. He said that between the three of them they knew where most of the employees lived. The addresses they did not know were obtained from other employees who they approached. He admitted that some employees who he approached asked how he knew what to do and he advised them that a lawyer had been retained and that the lawyer's name had been obtained from the plant manager. He said he may have told as many as ten employees this. In fact, someone went on to ask whether the lawyer knew what he was doing. He said he was not present when Davis and Lamoureux obtained their signatures because he was back in the car. He agreed that towards the end of September he walked around the plant and talked to employees about the organizing drive and the petition. Many times, however, employees came to him to talk about the situation. He did not recall ever showing the petition to employees while his supervisor or a foreman was about. He telephoned Mr. Horan because he was on the top of the list of lawyers provided by Mr. Hampton and at that time knew nothing about a petition or its effect. He said they told Mr. Hampton that they wanted to get help to know what to do and may have said they wanted "to fight the union". He denied that there was any mention of who would pay the lawyer's fee and how it was going to be paid. The fee remains unpaid. Leyte believed the employees knew what they were signing even though the preamble was covered because of what he told them. He could not recall any employee asking him whether Mr. Hampton was going to see the petition. He testified that people were approached on a friendly basis and that no pressure was imposed. When they asked the plant manager for help the plant manager said he would have to get in touch with his lawyer. After lunch he was then given the names of the three lawyers by the plant manager.

29. Joe Lamoureux, had been employed with the company for about a year and a half at the time. He and Mr. Leyte heard about the union and went to see Mr. Hampton to determine what they could do to counteract the drive. He testified that Hampton replied he could do nothing but he would get in touch with his lawyer and "that he would get us some help". In the afternoon he and Leyte went back to see Mr. Hampton and they were given a list of three lawyers. He said that after that everything was left up to Mr. Leyte. When Mr. Leyte was told by the lawyer to circulate the petition he, Mr. Davis and Mr. Leyte then started to circulate the petition. Mr. Lamoureux identified his signature as #15. He signed as a witness for #7, #8, #9, #10, #18, #20, and #21. #7 was obtained at that employee's home on October 15th at about 8:30 p.m. The employee was told that they were "running a petition around against the union and whether he was for or against". He said that when he approached these employees his colleagues remained in the car. #8 was approached the same day at his home as was #9 and #10. #18's signature was obtained on October 16th at about 10:00 p.m. at his home. #20 was obtained shortly thereafter that same evening as was #21. All of these employees live in the Georgetown area. He said that every employee he approached signed the document. He did not tell these people about the lawyer who was assisting them. On cross-examination by the applicant's counsel, it was apparent that the manner in which Mr. Lamoureux concealed the names of those who had signed the document also concealed the preamble. However, Mr. Lamoureux indicated that all of the employees he approached knew exactly what he was doing and the purpose for which he was requesting their signature. He agreed that he, Davis and Leyte had not discussed retaining a lawyer before going to see Mr. Hampton. He said that when Mr. Hampton gave them the list of lawyers was the first time the idea of retaining a lawyer came into

his mind. He admitted that he had used a lawyer to purchase a house but that his wife had handled that and it had not occurred to him to seek advice from that lawyer. Mr. Lamoureux denied that there had been any discussion with Mr. Leyte about the lawyer getting paid or about who was responsible for paying the lawyer's fee. He said he did not know who was going to pay the fee of the lawyer; he had not seen the lawyer's account; and he had not been approached for a contribution in this respect. He testified that he and his colleagues did not have a list of employees' addresses and that they operated entirely on their own knowledge or on what other employees told them. He agreed that he and Mr. Davis and Mr. Leyte would know who signed the statement of desire and who refused to sign it. He testified that it was well known in the plant what he and his colleagues were doing. He denied that anyone asked whether Mr. Hampton was going to see the petition.

30. Mr. Davis has been employed by the respondent company for ten years. His signature was #2 on the document and he witnessed #11, #12, #13, #14, and #15. He testified that he witnessed Mr. Leyte's signature at coffee break on October 15th. #11 was obtained in a parking lot at a Georgetown plaza. The employee was advised that Mr. Davis was starting a petition against the union and asked if the employee would support him. He also acknowledged that by covering up the names of people who had signed the document he also covered up the preamble. However, he indicated that his fellow employees trusted the three of them and that only one employee asked to see the preamble. #12's signature was obtained at that employee's home on or about October 15th. #13 was obtained in the same manner as was #14. #15 was obtained the same day at about 10:30 or 10:45 p.m. He also denied any discussions about how the lawyer was going to be paid. He said Mr. Leyte was handling all that and that Mr. Leyte had talked to the lawyer "just the other day". He said he assumed that the three of them were going to have to pay the account. He testified that he was aware that Messrs. Leyte and Lamoureux had met with Mr. Hampton and it was only after that meeting he heard about a lawyer. He denied telling any employee that Mr. Hampton had been approached.

31. Mr. Davis testified that he was well aware of the union organizing campaign and probably knew of it after the third or fourth union employee had signed up. He said that word travels very fast in the plant. He said he was aware of the union meeting on October 6th and indeed had been invited to go by one of the union members who had signed a card. He said it may have been known that the company helped with obtaining a lawyer. But he emphasized that the three of them got together because they disliked the unions. He testified that none of the people he approached refused to sign the statement of desire. No one asked what was going to be done with the list. He said that he doubted any employee thought that Mr. Hampton was going to see the list in that they worked together and knew that the three of them wished to counteract the union. He said that no one hesitated before signing.

Submissions

32. The first submission of the company is that given the substantial passage of time since October 9th, 1980 (the date of application) and the fact that even at that time the union's support was only marginally above fifty-five percent, the Board ought to exercise its discretion and order a representation vote. It is not disputed between the parties that, since the date of application, the workforce has experienced a twenty

percent turnover. Counsel submitted that the easiest way for the Board to ascertain the true wishes of the employees is by directing a representation vote. He agreed that the Board had rejected this approach in *Fuller's Restaurant*, [1980] OLRB Rep. Sept. 1289 but pointed out that delay in this case was some five months greater. It was suggested that the Board ought to take into account the Divisional Court's decision where there is comment on the apparent uncertainty of the employees with respect to trade union representation. In response, counsel for the applicant submitted that the matter had been remitted to the Board and that any delay was no fault of the applicant trade union. He submitted that the applicant was entitled to be put in the same position it would have been in had the Board not erred initially and also stressed that there is always the possibility of slippage in membership support between a membership drive and the date at which the trade union is able to execute a collective agreement. He said that it was for a trade union to meet with bargaining unit employees to explain the collective bargaining process and to encourage their support after the issuance of any certificate and that this case would be no exception. It was the applicant's position that the turnover was not significant and those employees who left may or may not be trade union supporters. It was also asserted that by ordering a representation vote the trade union would clearly not be placed into the position it would have been in in that it would be hard pressed to recapture the momentum it had achieved immediately following its organizing drive in 1980 for the purposes of a representation vote ordered in 1982. It was further submitted that such an approach would also encourage litigation in the courts.

33. The second submission of the respondent company is that a counter-petition is not contemplated by the Board's Rules of Procedure and that therefore the Board has no jurisdiction to take such evidence into account when weighing evidence of membership. Counsel submitted that by ignoring counter-petitions the procedures of the Board will be simplified and all a union will lose is an opportunity for outright certification without a vote. Counsel admitted that his submission was clearly against the weight of authority dating as far back as *Brampton Poultry*, [1961] OLRB Rep. Sept. 212. The most recent statement of the Board's approach was pointed out in *Browning-Ferris Industries*, [1982] OLRB Rep. June 816. Counsel for the applicant relied upon the Board's recent decisions in *Leon's Furniture*, [1982] OLRB Rep. March 404 and *Browning-Ferris*, *supra*, as a clear indication of the Board's policy to accept and rely upon counter-petitions. Counsel for the applicant submitted that such documents constituted membership evidence within the meaning of 1(1)(1) and section 103(2)(j) and within the meaning of section 76 of the Board's Rules of Procedure. Reference was also made to Rule 86 of the Board's Rules of Procedure which indicates that the rules are not exhaustive and that the Board properly submits counter-petitions to the test provided for by Rule 73 by analogy. Counsel further pointed out that the Board was authorized to accept such oral and written evidence as it in its discretion considers proper by virtue of section 103(2)(c). The Board was also referred to *Uxbridge Beverages*, [1982] OLRB Rep. June 961. Counsel for the applicant submitted that trade unions are usually given very little notice of the existence of a petition because petitions are very often filed with the Board on or about the terminal date. A trade union notified after the terminal date is prevented from reacting to the petition by circulating a counter-petition. Hence, the Steelworkers have developed the practice of always circulating a counter-petition to confirm membership evidence and to respond to any possible petition that may be filed and of which they have no knowledge. Counsel submitted that the concept of a counter-petition has been

part of the practice before the Ontario Labour Relations Board for the last twenty years; that it is part of the labour relations scene in Ontario; and that, against this background, there would have to be a powerful legal and policy justification for dismantling the practice. Counsel submitted that it would be most unfair for the Board to deny itself the opportunity to see a change of heart whereby an employee signs a counter-petition and thereby lifts any doubt about his wishes. Reference was also made to *Frito-Lay*, [1981] OLRB Rep. May 538 and *Re Royal Canadian Yacht Club* [1981], 129 D.L.R. (3d) 554.

34. With respect to the evidence pertaining to the origination and circulation of the statement of desire, it was submitted by the applicant trade union that the petitioners had not demonstrated that the statement of desire represented a voluntary expression of employee wishes. Emphasis was placed on the fact that as many as ten employees may have known that the plant manager suggested to the petitioners that they retain a lawyer. Counsel submitted that knowledge of this assistance would cause employees approached by Mr. Leyte and his friends to worry about company knowledge of their refusal to sign the document opposing the trade union. It was also submitted that the inability of employees to see and read the preamble undermined the reliability of the document. Alternatively, it was submitted that even if the statement of desire was voluntary, the counter-petition was also voluntary and that the Board should not deviate from its practice as expressed in *Browning-Ferris, supra*, of accepting the last voluntary document in time as the clearest expression of employee wishes. It was submitted that it would be totally chaotic and counter-productive for this Board to engage in a balancing process of which document is more voluntary and that such an approach would ignore the fact that there is "peer pressure" in all aspects of an organizing campaign. Counsel emphasized that the counter-petition was clearly voluntary and that no employee could have suspected that his refusal to sign that document would have been communicated to the company. Reference was made to *Morgan Adhesives*, [1975] OLRB Rep. Nov. 813; ; *Frito-Lay, supra*; *Terminal Hotel*, [1979] OLRB Rep. June 580; *Conair Canada Limited*, [1982] OLRB Rep. Feb. 159. Counsel for the applicant submitted that it was entirely improper for the employer to refer the objecting employees to a lawyer and that the company did not take a hands-off position, particularly in light of its letter to employees of September 24th. It was therefore submitted that any association between the objecting employees and the employer would cause fear, concern and anxiety in the minds of employees who had supported the trade union. For support that the counter-petition was voluntary, reference was made to *Browning-Ferris, supra*, and *Uxbridge*, [1982] OLRB Rep. June 17.

35. On behalf of the respondent company it was submitted that the counter-petition could not be considered voluntary because of the captive audience created by the holding of a meeting in a small motel room and the peer pressure that would have encouraged the employees to sign the document put before them by Mr. Varley. The Board was asked to take careful note of the judgment of the Divisional Court in the instant matter wherein the Court seemed to be encouraging the Board to weigh the quality of the signatures between these two documents. It was submitted that peer pressure was no more proper whether exercised by employers or employees. It was counsel's submission that all of the evidence should suggest to the Board that the employees really have not made up their mind and that they ought to be given opportunity of expressing their true wishes by way of secret ballot representation vote. Counsel submitted that there was nothing improper in providing the employees with the

names of lawyers experienced in the field in that it was difficult to get this information elsewhere and that at all times the company indicated to employees that they had a right to joining a trade union and that the company could not interfere with this right.

Reasons

36. We are satisfied, having regard to the initial evidence of membership filed by the applicant, that more than 55% of the employees in the bargaining unit were members of the applicant trade union as of October 23rd, 1980, the date set by the Board pursuant to section 103(2)(j) for determining evidence of membership in a trade union. However, even where the Board is satisfied that more than 55% of the employees in the bargaining unit are members of an applicant trade union the Board may direct that a representation vote be taken pursuant to section 7(2). It is in the exercise of this discretion that the Board considers "evidence of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union", filed with the Board in compliance with Rule 73 of the Board's Rules of Procedure. Stated another way, evidence of objection by employees to certification or of signification by employees that they no longer wish to be represented by a trade union is not, having regard to the scheme of the Act, evidence relating to membership in a trade union for the purposes of an application for certification and for this reason a statement of desire, no matter what the actual wording, does not cancel out or revoke membership evidence submitted by an applicant trade union in the form prescribed by section 1(1)(1) of the *Labour Relations Act*. See *Caldwell Linen Mills Limited*, [1967] OLRB Rep. March 948 at paragraph 10; *Diebold Company of Canada Limited*, [1976] OLRB Rep. May 237 at paragraph 10; and *Re Royal Canadian Yacht Club and Hotel, Restaurant and Cafeteria Employees' Union, Local 75 et al.*, (1981), 129 D.L.R. (3d) 554 at 558. Rather, relevant "overlapping" evidence of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union, filed not later than the terminal date for the application, and where accepted by the Board as a voluntary expression of the wishes of the employee signatories, will generally cast a doubt on the evidence of membership filed by an applicant (to use the words of the explanatory note found in Form 6) such as to cause the Board to exercise its discretion under section 7(2) and direct the taking of a representation vote. It would be somewhat anomalous if evidence of membership, which must withstand the requirements laid down in the Act together with its related rules and forms, could be "revoked" by a much less formal and essentially unregulated course of conduct which usually follows on the heels of an employee having joined a trade union. By making a representation vote the maximum effect of an opposing petition the legislation both accommodates the resiling nature of petition evidence and recognizes that trade union organizing campaigns often require considerable investment of time and monies. Once an employee has signed a membership application form and submitted to the cautionary test of the payment of \$1.00, a trade union is entitled to rely on that commitment for the purposes of an application for certification to the extent that it is assured its application will not be dismissed on the basis of insufficient threshold membership support (i.e. 45 percent) by the mere filing of a "second thoughts" prior to the terminal date. If this was not the approach taken, a trade union would never know when to cease organizing. It is this relationship between membership and petition evidence which constitutes part of the policy behind permit-

ting this board to direct a representation vote even when the trade union files membership evidence on behalf of more than 55 per cent in the bargaining unit. It is also the reason why the statute distinguishes between an application date and a terminal date.

37. However, before considering the petition and counter-petition, we need to deal with the respondent company's position urging that the passage of time since the filing of this application justifies the directing of a representation vote. We cannot agree that a representation vote should be directed on the sole basis of the passage of time since the date of filing of this application for certification. Prior to the interim certification provisions enacted in 1975, the Board experienced many complex applications, that without the intervention of judicial review, took a very long period of time to process differences between the parties. These differences usually centered on the configuration and composition of the bargaining unit. Even today, complex applications for certification involving widespread unfair labour practices or bargaining unit problems can take more than a year to process. If the Board were to accept that the mere passage of time could so fundamentally affect the outcome of an application for certification, an unfairness would be visited on those applicants who, by no fault of their own, become involved in complex and lengthy certification matters. There may also be encouragement for some parties to seek to delay a case in order to achieve this outcome. Clearly, there are equities on both sides of this issue. The turnover in the employer's workforce since the date of application is considerable. However, as already noted, the same level of turnover is possible in a lengthy application for certification not involving judicial review. In fact, the statute, by creating the concepts of "application date" and "terminal date", has considered the effects of labour force turnover and recognized that at some point in time the composition of a bargaining unit must be considered frozen to provide a stable basis for the purposes of a certification application. See *Fuller's Restaurant*, [1980] OLRB Rep. Sept., 1289. Considering the submissions of the parties and the evidence before us, we are of the view that the parties are best put in the position they would have been in had the Board not erred by considering this application as if there had been no passage of time.

38. We now turn to a consideration of the counter-petition and petition. As reviewed above, three employees who executed membership evidence soon after signed a statement of objection to certification by the applicant trade union and subsequent to that act reaffirmed their support for the applicant trade union by executing a counter-petition circulated by Mr. Varley and Mr. Roberts. It was the respondent company's position that the Board has no jurisdiction to entertain the counter-petition, even though filed by the terminal date, in that the Rules of Procedure of the Board make no reference to counter-petitions. It should be noted that the Board has entertained counter-petitions at least since 1957 and that this practice of the Board is well-known to the labour relations community. See *Sylvania Electric (Canada) Limited*, [1957] OLRB Rep. July p. 19; *Preston and Sons Limited*, [1960] OLRB Rep. Aug. p. 195; *Brampton Poultry*, [1961] OLRB Rep. Sept. 212; *Fleck Manufacturing Limited*, 62 CLLC ¶16,236. One of the most direct and early rejections of the submission made to us in this case is found in *National Seal Division of Oil Seals Limited*, 63 CLLC ¶16,295. Since these early cases, the Rules of Procedure have been amended a number of times, as has the Act. Against this background, we agree with the applicant that there should be a compelling legal justification for dismantling such a long-standing practice and, in our

view, there is none. A counter-petition is as relevant to the wishes of employees and the exercise of the Board's discretion under section 7(2) as is evidence of objection by employees to certification or of signification by employees that no longer wish to be represented by a trade union. As pointed out by the Divisional Court in the instant matter, section 91(12) obligates the Board to give the parties a full opportunity to be heard. We also note that Regulation 546 is entitled "Rules of Procedure" and section 86 of these Rules indicates that the rules so prescribed are not intended to be exhaustive. Rule 86 provides that "procedure not prescribed is governed by analogy to these Rules". The Board is therefore acting properly in holding counter-petitions, which relate so closely to membership evidence and evidence of opposition, to the requirements of section 73 "by analogy". When all of these bases for the Board's practice are reviewed it is difficult to conclude the Board lacks jurisdiction to entertain such evidence.

39. We have carefully considered the evidence of Varley and Roberts and are satisfied that the counter-petition affirming membership in the applicant trade union constitutes a voluntary expression of the wishes of those employees who signed the document. It is important to note that only those employees who had already executed membership evidence in the applicant attended the meeting called by Varley and Roberts on October 21st, 1980. The organizers had no way of forcing or coercing these employees to attend a meeting held at a local motel off company time and away from company premises. Varley and Roberts were not fellow employees and had no control or power over the employees who attended this meeting. Indeed, the attendance of employees at the expense of family and leisure time is an indication of interest in the applicant. Accordingly, the Board concludes that they attended this meeting of their own free will and because of their interest in the organizing drive and the outcome of the application with this Board. The Board is satisfied that there is no merit to the employer's argument that the meeting in the hotel constituted "a captive audience". That phrase, in labour relations jargon, is limited to meetings called by an employer on company time and company premises. Employees may be obligated to attend or at least their failure to do so may identify them to the employer as trade union sympathizers. An employer, unlike Varley and Roberts, does have considerable and important control over the lives and welfare of his employees. Labour Boards have therefore been concerned about the impact of such meetings. The same kinds of concerns are not warranted at the type of meeting called by Varley and Roberts. Admittedly, there may have been "peer pressure" to attend and "peer pressure" to sign the counter-petition. But such peer pressure is inherent in trade union organizing drives and has never been considered relevant in determining the reliability of trade union membership evidence. If it was deemed relevant, this Board would be ordering representation votes in all applications for certification and the legislation clearly does not contemplate that outcome. Rather, trade union conduct is subjected to the tests of intimidation, coercion and misrepresentation. Based on the same reasoning, we accept the voluntariness of the signature obtained from the employee who was unable to attend the meeting of October 21st and who signed the counter-petition at his home in the presence of Varley and Roberts. He appears to have been genuinely ill and asked the organizers to report to him on the meeting. There was nothing improper in making that visit or in what was said and done during the visit.

40. We now turn to the petition. The evidence raises three issues pertaining to the voluntariness of the statement of desire or petition. First is the propriety of Mr.

Hampton suggesting the name of three lawyers to the employees concerned. Second is the admission by one of those employees that he may have told as many as ten employees that he had retained Mr. Horan on the suggestion of the plant manager. Third is the effect of covering the preamble while soliciting signatures from employees. Before reviewing each of these issues it is useful to understand the general legal and policy background against which petitions are considered by this Board. There is usually and naturally an identity of interest between an employer and those of his employees interested in opposing an applicant trade union. In this context the circulation of a statement of desire involve petitioners approaching their fellow employees to solicit support. Understandably, an employee so approached may worry or feel anxious that his refusal to sign such a petition will become known to his employer given this natural interest employers have in employees opposing the trade union. But, this identity in interest between employer and opposing employees, standing alone, has never been viewed by this Board as undermining the reliability of signatures placed on a circulated petition. If this were not so, a petition could never be found to be voluntary. On the other hand, this is not to say that a similarity in interest between employer and petitioners is irrelevant and, indeed, it is the reason why this Board subjects the origination and circulation of a statement of desire in opposition to an application for certification to considerable scrutiny. There is an onus on those employees who present the documentary evidence to the Board to demonstrate that the signatures contained therein constitute a voluntary expression of the wishes of those employees who on recent and earlier occasion joined the applicant trade union. It is in this context that the Board, in the often cited *Pigott Motors (1961) Ltd.* case, 63 CLLC ¶16,264, made the following observation:

The Labour Relations Act contains detailed provisions designed to protect the rights of employees to become members of, and to select or reject a particular or any trade union as their collective bargaining agent and to bargain collectively or individually with their employer. It is an important function and duty of this Board under the legislation to be circumspect and vigilant to see that these rights are preserved and not made illusory.

There are certain facts of labour-management relations which this Board has, as a result of its experience in such matters, been compelled to take cognizance. One of these facts is that there are still some employers who, through ignorance or design, so conduct themselves as to deny, abridge or interfere in the rights of their employees to join trade unions of their own choice and to bargain collectively with their employer. In view of the responsive nature of his relationship with his employer, and of his natural desire to want to appear to identify himself with the interest and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act. It is precisely for this reason, and because the Board has discovered in a not inconsiderable number of cases, that management has improperly inhibited or interfered with the free exercise by employees of their rights under the Act, that the Board has required evidence in a form and of a

nature which will provide some reasonable assurance that a document, such as a petition, signed by employees purporting to express opposition to the certification of a trade union truly and accurately reflects the voluntary wishes of the signatories. (See for instance, the *Sinnott News Case*, CCH Canadian Labour Law Reporter, 1955-59, Transfer Binder ¶16,114 at p. 12,209, and the *Fleck Manufacturing Ltd. Case*, CCH Canadian Labour Law Reporter, vol. 1, ¶16,236, at p. 13,201). In seeking this assurance, the Board draws no distinction between documents which purport to express a desire on the part of employees to resign from the union and those which purport merely to express opposition to the applicant as their collective bargaining agent. In other words, for this purpose, it does not seek to distinguish between the two matters of membership and representation.

41. Actions by either the employees opposing the trade union or the employer can adversely affect the reliability of a statement of desire. Direct and open support by an employer will obviously suggest a relationship between the employer and the petitioners that would reasonably cause anxiety in the minds of employees approached by the petitioners. Therefore, in such circumstances, it would be just as reasonable to infer that the employees signed the document to conceal their support for the trade union as it would be to conclude that they signed voluntarily. Where this is the case, the Board usually takes the view that the petitioners have not satisfied the onus on them and the statement of desire is dismissed as an unreliable indicator of the true wishes of the employees. Similarly, actions by the petitioners without support of the employer can equally destroy the reliability of a statement of desire. Circulating a document in the presence of foremen or representations clearly indicating support by the employer can produce the same anxiety in the minds of employees whose signatures are solicited and thus prompt the Board to respond in a similar fashion.

42. In the instant case two of the petitioners approached the plant manager. He did not single them out and we are of the view that the plant manager's letter of September 24th would only encourage employees who wished to oppose the trade union to approach the plant manager. But the letter clearly conveyed where this employer stood on the issue of collective bargaining to the entire work force, a fact which is relevant to our conclusion at paragraph 45. We find that it was the plant manager who suggested that the employees retain a lawyer and, after consulting with his own solicitor, came forward with the names of three lawyers. The Board has experienced at least two types of situations in the area of lawyer referrals. In *Charles Wilson Limited*, [1979] OLRB Rep. Jan. 20, a group of employees wishing to oppose the trade union met with a general manager and an assistant general manager and the general manager advised the employees "to see a lawyer". During the course of this meeting which lasted some ten minutes, the employees wanted to discuss the benefits which they currently enjoyed and desired to know the benefits they would receive if the respondent trade union was not representing them. The two managers informed them that there was no way they would discuss these matters at all. The Board stated it was not prepared to find that this contact with members of management in itself destroyed the voluntary nature of the subsequent statement of desire. It was stated that the effect of such contacts must be considered in the context of the surrounding events and the response of management.

The Board found nothing in the evidence with respect to that meeting which reflected upon the voluntariness of the statement of desire. The Board noted that "short of remaining mute" there was little else the managers could reasonably have done. On the evidence before the Board it was decided that the employees had received no encouragement from the meeting. In *Northland Glass and Metal Limited*, [1982] OLRB Rep. July 1037, an employee approached the employer and, after indicating that the employees were to seek to decertify the incumbent trade union, asked him if he knew a lawyer who could represent them. The employer gave the name of counsel who was acting for the applicant and told the employee that he could find the lawyer's telephone number in the directory. There was no further discussion then or later between the applicant and the employer. In refusing to dismiss the application for decertification the Board ruled:

While Mathon's request of the employer for the name of the lawyer to assist the employees with their application raises concerns about the voluntariness of the statement, standing alone it is not sufficient to indicate that the statement of desire was inspired, fostered or instigated by management influence. This is not a situation in which there has been some sudden, unexplained change in the intent of the employees which may happen in an application for certification when employees who have recently signed application cards in support of the trade union shortly thereafter sign a petition against representation by that union.

43. Another line of cases represented by *Selinger Wood Ltd.*, [1979] OLRB Rep. May 434 and *A. R. Milne Electric Ltd.*, [1982] OLRB Rep. June 911, involve situations where an employer referring employees to a lawyer completely undermines the reliability of a statement of desire. In *Selinger Wood Limited* an employee attended on a member of management and, as a result, was referred to a lawyer. Upon enquiring of management as to who would be responsible for the payment of the legal fees involved, he was told not to worry about them, that the matter would be taken care of by the company. In the face of that evidence the Board was unable to find that the document presented in support of the application was voluntarily signed by any of the employees whose names appeared thereon. In *A. R. Milne Electric Limited* an employee talked over the matter of terminating a trade union's bargaining rights with his employer. Neither the employee nor the employer were certain about how a termination application could be made so the employer indicated he would contact the firm's solicitors to take care of the matter. Those solicitors obtained and prepared the documentation initiating the decertification application together with a covering letter for the employee's signature. When the employee had second thoughts about his course of action, his employer asked him two or three times whether the termination application had been filed and he eventually did so. Unsurprisingly, the Board was not satisfied that the application constituted a truly voluntary expression of the individual concerned.

44. Did the employer's conduct in the instant matter undermine the reliability of the document filed by the petitioners. It is significant that the two employees approached the plant manager with their minds made up to oppose the trade union. Had the employer simply advised that the employees should see a lawyer there would be no basis to a submission that the resulting statement of desire was adversely affected. However, Mr. Hampton not only suggested that a lawyer be retained, but also provided

the names of three lawyers. Where this is done, employees may feel obliged to take such specific advice or may conclude that the employer is willing to shoulder the costs of following a very specific recommendation, particularly when he has an obvious interest in seeing that the recommended cause of action is followed. On the other hand, plant manager did not follow up his advice to the employees and Mr. Leyte appears to understand that he must pay the lawyer's account, although curiously it remains outstanding. Having regard to all of the circumstances, we are satisfied that the employees were committed to opposing the trade union before they walked into Mr. Hampton's office and they would have opposed the applicant regardless of the plant manager's advice.

45. The next issue is Mr. Leyte's admission that he may have told up to ten employees that his lawyer's name had been suggested by the employer. We are of the view that this admission is fatal. To advise other employees that the lawyer representing the petitioners was suggested by the employer could reasonably create a direct link between the petitioners and the employer in the minds of employees approached by the petitioner. Understandably, they could fear that their refusal to sign the petition would be communicated to the employer particularly having regard to Mr. Hampton's letter to the work force dated September 24, 1980. This is one risk associated with very specific advice by employers to objecting employees.

46. With respect to the concealment of the preamble, of importance is Rule 73(2) of the Board's Rule of Practice which provides:

No oral evidence of membership in a trade union or of objection by employees to certification of a trade union or of signification by employees that they no longer wish to be represented by a trade union shall be accepted by the Board except to identify and substantiate the written evidence referred to in subsection (1).

47. Since its inception, the Board has been extremely cautious in the administration of this provision because of the policy of secrecy surrounding union membership provided for in section 111 of the Act. Section 111(1) provides:

The records of a trade union relating to membership or any records that may disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union produced in a proceeding before the Board is for the exclusive use of the Board and its officers and shall not, except with the consent of the Board, be disclosed, and no person shall, except with the consent of the Board, be compelled to disclose whether a person is or is not a member of a trade union or does or does not desire to be represented by a trade union.

48. However, recently the courts have admonished the Board to be cautious in refusing to permit petitioners to explain their conduct in circulating a statement of desire. In *Re Fisher et al and Hotel, Clubs, Restaurants, Tavern Employees' Union, Local 261 et al.* (1980), 110 D.L.R. (3d) 393, the Divisional Court quashed a Board decision refusing petitioners the right to adduce oral evidence to show that, notwithstanding a poorly worded preamble, the document was in fact intended to represent the

employees' opposition to the certification of the union. In the instant matter the preamble was clear on its face and no issue of whether the Board would hear or refuse to hear evidence to substantiate the document immediately arose at the hearing or was discernable on the face of the document. The petitioners were permitted to call whatever evidence they wished and only on calling this evidence did it become clear that the preamble had been concealed from all the signatories save for one employee who asked to see it. Considering all the evidence, we are of the view that the document ought to be accepted. There is no doubt that a preamble was contained on the face of the petition at the time it was signed by all employees and that each employee had the opportunity of asking to examine the preamble if he or she wished. No employee had the document misrepresented to him or her. We further point out that the evidence called by the petitioners did not in fact raise a section 111(1) issue in itself or in terms of the applicant trade union's response and, thus, in the circumstances of this case, the Board is prepared to rule that the statement of desire is not objectionable or its reliability undermined by this action of the petition's proponents. Any other approach would be entirely too technical.

49. From the foregoing analysis, we have concluded that Leyte's admission he may have told as many as ten employees that the plant manager suggested the name of the lawyer assisting them destroys the reliability of the petition document as evidence of the voluntary expression of employee wishes who signed it. However, even if we had concluded the petition was a voluntary expression of employee wishes, all of the evidence before us points out the difficulty of forming any conclusion under section 7(2) based on a comparison of the voluntariness of the two forms of petitions. For example, the visit of Varley and Roberts to the home of one employee is no more significant or objectionable in assessing the voluntary wishes of that employee than the visits of Leyte, Davis and Lamoureux. This is the nature of a organizing campaign and opposition to it. One document cannot be preferred over another at this level of analysis. The apparent rapid changing of minds on the part of three employees can be explained as a protective response in signing the petition (and, thus, the voluntary execution of the counter-petition when that document was made available to them), as a product of peer pressure (a condition which afflicts all campaigning), or as a product of true confusion or indecisiveness. Given the concern of the statute for confidentiality, it is seldom possible to ascertain if the last factor exists and is the principal cause for the petition and counter-petition. To order, as a general matter, a representation vote in such circumstances would give undue weight to this possibility and ignore the emphasis the statute places on membership cards as the method of determining employee wishes where this support is in excess of fifty-five per cent. While the full breadth of the comments of the Divisional Court in this matter must be given very careful consideration, we think it fairer and consistent with the Act's scheme that employees be governed by their voluntary actions and, in particular, their last voluntary response to the Board prior to the terminal date. While there may be exceptional situations, the experience in this case tends to confirm that in the face of a relevant voluntary counter-petition, a voluntary petition will not be sufficiently probative to the exercise of the Board's discretion under section 7(2) to merit an inquiry into the petition's origination and circulation.

50. On the evidence before us, therefore, the Board is satisfied that more than 55% of the employees in the bargaining unit as of the terminal date were members of

the applicant trade union and that, in our opinion, there are no grounds for this Board to exercise its discretion pursuant to section 7(2) and direct the taking of a representation vote.

51. A certificate will therefore be issued to the applicant.

DISSENT OF BOARD MEMBER C. G. BOURNE;

1. In view of the many complex factors affecting this case, viz;
 - a) the lapse of time from the original application on October 9, 1980, the reference to Divisional Court in 1981 who remitted it back to the Board, the Appeal which was rejected on December 16, 1981 and the most recent hearings on September 8/9, 1982;
 - b) employee turnover of 20% in the interim;
 - c) the original membership vote which was marginally above 55%, and
 - d) the difficulty in evaluating the weight to be given to the petition and the counter-petition;

I would advocate putting the matter to a vote of the employees concerned in order to provide a final and definitive answer.

1047-82-R Norman Marsden, Applicant, v. International Association of Machinists & Aerospace Workers, District Lodge 717, Respondent, v. **Byers-Bush (1977) Ltd.**, Intervener

Evidence – Petition – Practice and Procedure – Termination – Whether photostat copies of termination petition acceptable – Board stating inherent dangers – But accepting petition in circumstances

BEFORE: D. E. Franks, Vice-Chairman, and Board Members J. Wilson and S. Cooke.

APPEARANCES: *Norman Marsden and Cecil F. McPherson for the applicant; Joseph Atkinson for the respondent; J. Ramsay and H. Byers for the intervener.*

DECISION OF THE BOARD; October 20, 1982

1. This is an application for termination of bargaining rights made under section 57 of the *Labour Relations Act*.

• • •

3. The respondent and intervener are party to a collective agreement which expires on October 25, 1982 in respect of the following unit of employees:

“all employees of Byers-Bush (1977) Limited at Mississauga, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.”

This application having been made on August 31, 1982, the Board, therefore, finds this is a timely application for termination of bargaining rights.

4. Accompanying the application in Form 17 was a photocopy of a petition headed as follows:

“The following people do not want to continue as members of the union at Byers-Bush (1977) Ltd.”

The petition was circulated by Mr. Norman Marsden who witnessed the other nine signatures on the petition, and who circulated the document in the short period before work began on August 12th and August 13th, 1982. His evidence is that he did not discuss the petition with any representative of the employer and that the various employees were in the shop area before work began and that there was no foreman or any other managerial person present when the document was circulated.

5. Mr. Marsden's evidence, which we are prepared to believe is that the heading on the document was written by his girlfriend (because, as he put it, his handwriting is not very legible). His girlfriend does not work for the intervener or have any

connection with the intervener and his evidence is that she is the only other person who at any time was in possession of the petition. Indeed, Mr. Marsden's explanation about how the petition came to be in the form of a photocopy is that his girlfriend took the original of the petition to her place of employment and made photocopies of the petition. A photocopy was attached to each of the Form 17's filed in quadruplicate. When questioned about the other photocopies, Mr. Marsden's evidence was that the remaining photocopies and the original were at home. He failed to realize any necessity to bring them to the present hearing.

6. His evidence, however, was quite clear that apart from the photocopies sent to the Board, the original and all other photocopies remain at home and have not been seen by anyone other than himself and his girlfriend.

7. We are of the view that the petition filed with the Board in this matter represents the true wishes of the employees. A question that remains is whether the Board should accept such a petition in the form of a photocopy or whether the Board should require such a document to be the original document. Accepting photocopy evidence obviously involves certain inherent dangers. Thus, an original might be altered and such alteration not be apparent on a photocopy. The Board has, for instance, in the case of evidence of membership filed by a trade union, refused to accept such documentary evidence as acceptable evidence because of such concerns. Thus, in the *Norfolk County Board of Education* case [1974] OLRB Rep. March 182 at 183 the Board noted as follows:

"4. The Board has examined with some concern the evidence of membership filed by the applicant in support of its claim for bargaining rights. They are photocopies of documents that purport to indicate that the undersigned in each case is an office employee in the employ of the respondent, that each is a member of the applicant trade union, and that the required initiation fee was paid. Save in two circumstances, the signatures purport to reflect copies of the counter-signature of the treasurer of the applicant and a date appears on each of the documents described herein. In the case of two documents, the signature of the treasurer seems to have been penned in after the photocopies were taken.

5. The Board usually relies on the "best evidence" in accepting documents indicating the voluntary wishes of employees to be members of a trade union. The Board relies heavily on such evidence and normally accepts documents indicating membership in a trade union at face value. In this regard such reliance is usually predicated upon the filing of the authentic, original membership cards. The Board imposes such strict standards with respect to the acceptability of such evidence in order to avoid the onerous task of requiring oral testimony of each and every person who purports to be a member of a trade union pursuant to an application for certification. In short, the practice of the Board in satisfying itself

of the true and voluntary wishes of employees who desire to be members of a trade union is to rely on "the best evidence" available.

6. The hazard of accepting photocopy evidence is indicated in the two instances referred to in paragraph #4 herein. In those instances, the signature of the treasurer is handwritten on two cards. That is to say, in those examples the photocopies are not a true replica of the original cards. It is noted that this matter was not disclosed in the Form 8, Declaration Concerning Membership Documents. It follows, therefore, that for the Board to accept the membership evidence filed by the applicant we would have to condone an obvious (whether intended or not) misrepresentation. The Board, therefore, does not hesitate to set aside all of the applicant's evidence of membership.

7. In order that the Board's decision be not misunderstood, it wishes to add the following for the applicant's benefit. The Board in most circumstances, will require that documents purporting to be membership cards be filed in their original form. Nevertheless, there may very well be circumstances where photocopy evidence may be the only evidence available for purposes of establishing a claim to representative rights. In such instances, the Board is of the opinion that the matter of the photocopy evidence should be disclosed in advance and that the applicant be prepared, at the hearing, to establish the authenticity of such evidence."

On the other hand, in the *International Woodworkers of America* case [1975] OLRB Rep. Aug. 631, the Board was able to satisfy itself that the photostat was free from such concerns and accepted a petition in a termination case notwithstanding the fact that the petition which was filed was a photostat.

8. In the present case, like the *International Woodworkers of America* case referred to above, we are satisfied that the document presented to the Board is a true copy of the original document, and that custody of the original document and the copies was at all times in the hands of the applicant throughout the relevant period of time.

9. Accordingly, the Board finds that not less than forty-five per cent of the employees of Byers-Bush (1977) Ltd. in the bargaining unit at the time the application was made have voluntarily signified in writing that they no longer wish to be represented by the respondent union as of September 13, 1982, the terminal date fixed for this application and the date which the Board determines under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining the number of persons who have voluntarily signified in writing that they no longer wish to be represented by the respondent under section 57(2) of the Act.

10. The Board directs that a representation vote be taken of the employees of the intervener in the voting constituency set out above. Those employees eligible to vote are

all employees of the intervener in the voting constituency on the date hereof who do not voluntarily terminate their employment or who are not discharged for cause between the date hereof and the date the vote is taken.

11. Voters will be asked to indicate whether or not they wish to be represented by the respondent in their employment relations with Byers-Bush (1977) Ltd.

12. The matter is referred to the Registrar.

0197-81-U Stanley Dwyer, Applicant, v. United Automobile Aerospace & Agricultural Implement Workers of America U.A.W. – International Union, United Automobile, Aerospace & Agricultural Implement Workers of America U.A.W. Local 1285, Respondent, v. **Chrysler Canada Limited**, Intervener

Duty of Fair Representation – Unfair Labour Practice – Grievor not permitted to be present at settlement discussions – Denied representation by own lawyer at arbitration – Union refusing to initiate judicial review proceedings – Board finding union conduct not unlawful in circumstances – Deciding complainant not credible witness – Commenting on effect of delay in filing complaint

BEFORE: R. O. MacDowell, Vice-Chairman.

APPEARANCES: *E. G. Posen for the applicant; E. D. Bruce, B. E. Hargrove and L. A. MacLean Q.C. for the respondent; M. D. Contini and C. Gyles for the intervener.*

DECISION OF THE BOARD; October 12, 1982

1. This is the complaint of Stanley Dwyer, who alleges that he has been dealt with by the respondent union contrary to the provisions of section 68 of the *Labour Relations Act*. That section reads as follows:

68. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

2. The trail of litigation preceding the instant complaint is a long one, and the span of time encompassed by the evidence is even longer. The case took more than twelve days to litigate, involved copious oral and documentary evidence, and touched on events going back more than a decade. It is not necessary to reproduce, as reasons, the details of this testimony. It will be sufficient if the Board reviews the evidence in a general way and notes its findings, together with the credibility considerations on which they are based. At the outset, it will be useful to briefly outline the legal events preceding the present application. Once this context is established, the Board will then examine those events in greater detail.

I – Overview

3. The complainant was first hired by Chrysler in September, 1968. Between 1968 and 1976 he had a somewhat checkered career (see *infra*). On July 9, 1976, he was terminated, (not for the first time), for failing to notify his employer of his absence as

required by Article 23(c) of the then applicable collective agreement. That Article reads as follows:

Seniority shall cease for any one of the following reasons:

• • •

(c) if the employee is absent for five (5) regular working days without advising his superior giving satisfactory reasons.

4. The termination of the complainant was grieved and eventually came before Arbitrator K. A. Hinnegan. The principle issue before him was whether Mr. Dwyer had notified the company of his absence. But Arbitrator Hinnegan disbelieved the complainant's evidence in this regard, and sustained the discharge. No question was raised before Arbitrator Hinnegan as to the effect of the loss of seniority triggered by Article 23(c). It was assumed that it automatically resulted in an employee's termination. For reasons set out below, both parties to the agreement then accepted that this was the intended result of the language that they had negotiated.

5. The complainant applied for judicial review of the Hinnegan decision, and argued that a loss of seniority did not, in itself, result in a discharge. In Mr. Dwyer's submission, Hinnegan's interpretation was based upon a premise which the language of Article 23(c) could not reasonably bear. On April 21, 1978, the Divisional Court, by a majority, accepted that position; but since the issue had not been raised before the Arbitrator, and the complainant's rights without seniority had not been decided, the matter was remitted to a new arbitrator on these issues alone. The company's request for leave to appeal to the Court of Appeal was denied.

6. A second arbitrator was selected and hearings were held in the Fall of 1978. By a decision dated October 23, 1978, Arbitrator J. D. O'Shea, Q.C. upheld the complainant's discharge once again. Back the complainant went to the Divisional Court, but this time he was unsuccessful – in part, it appears, because the Court was unwilling to entertain arguments which had not first been put to the Arbitrator. The Divisional Court decided that the complainant could not, with the benefit of hindsight, reargue his case. The second application for judicial review was dismissed on March 13, 1980. The complainant's application for leave to appeal was refused.

7. On May 9, 1980, Mr. Dwyer launched a new complaint against the company before the Ontario Human Rights Commission, claiming that his termination was motivated by racial considerations. There is no evidence that this allegation had ever surfaced before. On February 11, 1981, the Ontario Human Rights Commission advised him that it had investigated his complaint, had found no evidence of discrimination, and would not appoint a board of enquiry. This decision was appealed to the Ombudsman. Its present status is uncertain. In addition, there is an outstanding civil suit against the company, the basis of which is unclear. The present complaint was filed on April 24, 1981.

8. In summary then, by the time this complaint was filed, there had been: two arbitration proceedings, two references to the Divisional Court, two references to the

Court of Appeal, one reference to the Ontario Human Rights Commission, a reference to the Ombudsman, and a civil action. In all but the civil action, the objective of Mr. Dwyer has been to obtain reinstatement and full compensation for the wages and benefits he has lost since his termination in 1976. That is essentially the position he takes in the instant case, except that now he seeks compensation for his losses from the respondent union rather than from the company, and he further seeks a direction that there be a new arbitration on the merits of his discharge. His allegations against the union involve, *inter alia*: an alleged antipathy between the complainant and various union officials; the alleged mishandling of his two grievances by union representatives; and the alleged failure to adequately support or finance his applications for judicial review. The union resists the complaint on its merits, and both the union and the company argue that the complainant's unreasonable delay in launching it should preclude any relief. The union contends that it is unfair to have to defend itself against allegations raised, for the first time, years after the precipitating events.

9. The parties all contend that the present complaint can only be understood against the background of Mr. Dwyer's previous relations with the union and the company – hence the protracted hearing, and enquiry into events long preceding the 1976 termination.

II – Background 1968–76

10. The complainant's employment record is replete with controversy and conflict with members of management and with union officials. He regularly complained of mistreatment by the company and was concerned about collusion by his union representatives whenever they took a position different from his, or when, in Dwyer's view, they were not aggressive enough in supporting his position. He was forceful and determined, but also obstinate, argumentative, and intolerant of any views which did not coincide precisely with his own. These traits did little to endear him to persons in authority.

11. Mr. Dwyer's relationship with his union was marked by antagonism and suspicion. Of the many union officials at various levels who represented him over the years, he was hard-put to identify *any* whom he thought was satisfactory. He distrusted them; and throughout his career he regularly sought independent legal advice and requested the intervention of his own lawyer whenever he was dealing with the company. When he met with union representatives he often took a witness. He told the Board that the union local was run by a clique of individuals antagonistic to him, and, over the years, when new individuals were elected or appointed to union office "the word" about Stanley Dwyer was passed along. The new officials would then exhibit the same antagonism towards him as the previous ones. Mr. Dwyer's own ventures into local union politics were apparently unsuccessful, but he wrote letters of complaint to senior union officials, to the Minister of Labour, to his Member of Parliament, and to the Ombudsman when he had difficulties which he thought they should redress.

12. There is no doubt that the complainant is a strong-willed and determined man, vigorous in his assertion of what he believes to be his rights. He was a prolific grievor. The company's records indicate that Mr. Dwyer's personal grievances accounted for more than ten per cent of the total filed during his period of employment, and represent more than three times the number filed by the next most active grievor. In addition, the

complainant was involved in, or initiated, a number of other grievances in which he was part of a group. Of course, there is nothing improper about resort to the grievance procedure. That is the way collective agreement problems should be resolved. But the Board was struck by the content of one such grievance involving a claim for three minutes' pay. It is difficult to take that grievance seriously, and it may perhaps illustrate the complainant's irascibility, as well as an antipathy to his employer which he made no effort to conceal during his evidence before this Board. The complainant was obviously a difficult man to deal with and, in the circumstances, it is not surprising that he ran into problems.

13. From the company's point of view, the complainant was not a very satisfactory employee. He was suspended on several occasions, and, in 1973, he was discharged for failing to notify the company and provide satisfactory reasons for his absence – that is, for precisely the same reason as his discharge in 1976. The union also took that termination to arbitration. The complainant was represented by Larry Scheffe, a union representative, who ultimately won the case. By a decision dated January 23, 1974, Arbitrator W. B. Rayner concluded that Mr. Dwyer should be reinstated and compensated for his losses. But this success does not mean that the complainant was satisfied with Scheffe's performance, or with the quality of representation that he was receiving. He retained his own solicitor, a Victor Rosemay, to appear with him at the first hearing, and when he was dissatisfied with the union's handling of the compensation issue (the Arbitrator had reserved jurisdiction with respect to this matter), he pressed for a second arbitration hearing where it was Rosemay who represented him. The question before Arbitrator Rayner at this second hearing was whether the complainant was entitled to full back wages in respect of the period following his termination, or some lesser amount because he was unavailable for work during this period by reason of health. It is interesting to note that the sum ultimately achieved at arbitration appears to be substantially less than that which the union was offered and could have obtained on the complainant's behalf without the expense of a second hearing.

14. When pressed on this matter before the Board, Mr. Dwyer contended that neither the union nor his own solicitor kept him properly informed of the discussions with the employer – precisely the same complaint which he makes in respect of the union's handling of his grievance in 1976. The Board finds that proposition hard to believe. On the contrary, the evidence suggests that the complainant was unprepared to accept the settlement negotiated by the union on his behalf and preferred to take his chances through further litigation where, ultimately, he was unsuccessful. The Board further notes that in July of 1975, the complainant was warned once again by the company that a failure to substantiate an absence would result in his removal from both the seniority list and the company's employment rolls. Since that was the reason for his discharge in 1973, there can be little doubt that the complainant was fully aware of the requirements and potential consequences of Article 23(c).

15. The complainant's litigious inclinations were not directed only against his employer. In 1973, he complained to this Board (as he now does) that the union's handling of a grievance constituted a breach of section 68 [then section 60] of the Act. That complaint was dismissed, with reasons, by a decision of the Board dated August 2, 1973. In that decision the Board notes, parenthetically, that in the seven months preceding the complaint the union had processed seventeen grievances on Mr. Dwyer's

behalf – a number which, if correct, suggests that the company's figures referred to above may be underestimated. In any event, it is obvious that the complainant was or should have been aware of his right to seek redress in this forum in respect of any failure of the union to properly represent him. He had done so before.

16. The picture which emerges is of an assertive, obdurate, and critical individual, who was often dissatisfied, and distrustful of union and company representatives alike. Clearly he was not an easy person to relate to or represent, and, in the union's submission, this is a factor which must be considered in assessing his current allegations that the union failed to properly represent him in 1976 and 1978.

17. It is also important to consider Mr. Dwyer's veracity, for there were a number of conflicts in the evidence and his testimony was substantially rebutted by the various witnesses called on behalf of the respondent. In consequence, the Board has had to choose between them on the basis of such factors as: the consistency of their evidence, the firmness of their memory, their demeanour while testifying, the reasonableness of their explanations and their ability to resist the influence of interest to modify their recollections. It is always easy to reconstruct one's recollections with the benefit of hindsight and in light of later events, and even the most truthful witness (which, in my view, the complainant was not) may sometimes have difficulty distinguishing between what actually happened, and how those events were perceived.

III – Credibility

18. The complainant was on the stand for several days and the Board had ample opportunity to consider his performance. In general, the Board did not find the complainant to be a candid or credible witness nor, on balance, does the Board consider his evidence to be reliable. He was often evasive and occasionally belligerent. His memory was conveniently selective, and he frequently refused to acknowledge circumstances – otherwise uncontested – which might portray the union in a good light (as, for example, the incident of his earlier discharge, *supra*). His evidence was often slanted, and his use of language or choice of words was calculated to create an inference of impropriety. But when pressed, he frequently retracted his original assertions, modified them, or retreated into a general statement that he could not recall precisely what had occurred but that is how the matter appeared to him. The Board also had the impression that portions of his evidence were an *ex post facto* rationalization of the facts in light of subsequent events. It may be useful to be a little more specific on these points since the complainant's credibility is a critical element in this case.

19. The complainant's contention is that the union was antagonistic to him and mishandled his discharge grievance. He initially testified that union officials "refused" to supply him with the company's reply to that grievance. It turns out – and the complainant admitted on cross-examination – that there was no "refusal" at all, nor could there be. The employer was tardy in filing its reply and the union officials were making an effort to obtain it. The union could not give the complainant information it did not itself have, nor could the union "refuse" to provide such information. This was but one of the many instances when the complainant's choice of words suggested misconduct on the union's part when in fact there was none.

20. Another example arises from the claim that the union failed to keep him informed. Mr. Dwyer testified that he was “surprised” to learn that his case was proceeding to arbitration. He testified that he did not learn about this until late in September 1976. In fact, the evidence demonstrates, unequivocally, that there were a number of conversations with various union officials throughout the processing of his grievance. On August 25th he wrote to the union referring to one such conversation, asking the name of the arbitrator, the date, time and place of the arbitration, and whether the union was taking any “disciplinary action” against the company for failing to reply quickly enough. The obvious inference is that sometime before August 25th, he learned that his case was proceeding to arbitration. He told the Board, however, that he wrote this letter *speculatively, just in case* his grievance might go to arbitration at some point. He maintains that the union kept him in the dark and he did not advise about the prospect of arbitration until much later. But neither the text of this letter nor the evidence of the other witnesses is consistent with that proposition. On the contrary, their evidence is that he was continually badgering union officials to get the case moving because he was out of a job. Once again Mr. Dwyer was slanting his evidence and colouring the truth.

21. When examined about the seriousness of some of his grievances, the complainant responded to the suggestion that some of them might be minor with the unequivocal assertion that he would never file a grievance simply to obtain an apology. He testified that it would make no sense to invoke the grievance procedure solely for an apology. That would be a misuse of the grievance procedure and he would never do such a thing. Exhibit #63 is a grievance in which the complainant seeks only an apology.

22. The complainant told the Board, repeatedly, that he did not understand that he had been *discharged* in 1976, or that termination was the effect of a loss of seniority under Article 23(c). He said that he was uncertain about his status and was not sure whether he had actually been fired. This proposition might make sense after the Divisional Court decision and the second arbitration. The former had determined that a loss of seniority was not tantamount to a discharge, and the second Arbitrator had to consider whether there had been a termination apart from the loss of seniority. In retrospect, the status of the complainant was uncertain. But not at the time. The complainant had been fired before for precisely the same default, and a letter which he wrote to the company in August, 1976, a few weeks after his discharge, contains the phrase “seing I am dismissed from the company and removed from the payroll. . .”. Yet, Mr. Dwyer maintained before this Board that he did not understand that he had been fired, and further that he was unaware of the company’s well-established practice of treating a breach of Article 23(c) as a termination. No doubt a straightforward answer to these questions might have prejudiced the complainant’s position in the earlier cases. Here they reflect solely on his credibility.

23. When pressed on cross-examination on a wholly unrelated issue, the complainant testified, quite unexpectedly, that David Gow, the alternate plant chairman, had called him a “nigger” and a “black bastard”. Such racial slurs, if true, would be highly significant and go a long way to support Mr. Dwyer’s complaint. But these allegations were not mentioned in the complaint itself, or at any point in his direct examination. Nor was there anything about it in the complaint to the Human Rights Commission – a

fact which Mr. Dwyer explained resulted from his telling the whole story to the O.H.R.C. intake officer, who, in Mr. Dwyer's submission, only recorded portions of it. Any omissions were the intake officer's fault.

24. Counsel for the complainant immediately rose to indicate that the allegations had not been raised in the complaint, they had not been particularized, they had not been brought out in direct evidence, and they would not be relied upon. Counsel for the union, however, argued that the matter was relevant to the complainant's credibility and Gow took the stand to specifically deny the allegations. The union further argued that it was the same kind of unexpected, self serving and contested assertion which prejudiced complainant's credibility in the eyes of arbitrator Hinnegan.

25. On the basis of the totality of the evidence respecting this matter I find that the suggestion of racial slurs was a total fabrication. The Board also acknowledges the force of the union's submission that it was a similar unsolicited and unexpected statement from the complainant which prompted arbitrator Hinnegan to disbelieve him. Moreover, the explanation for the deficient O.H.R.C. complaint is the same one which the complainant advances to explain certain alleged omissions from his written grievance which will be dealt with in detail *infra*. This was but one of a number of themes in the evidence which were to reappear from time to time.

26. It would serve little purpose to multiply the examples. It suffices to repeat that on the basis of the totality of the testimony the Board did not find the complainant's evidence to be credible or reliable and in general chooses to prefer that of the other witnesses.

IV – The 1976 Discharge and Arbitration

27. Because of his back problems, the complainant was not working regularly in the months preceding his termination. He was off work continuously from March 24, 1975, until June 27, 1976. He returned to work on Monday, June 28th, worked part of that day as well as June 29th, June 30th and Friday, July 2nd, then was absent for the following week. By letter dated July 9, 1976, the company advised him that he was "cleared from its rolls" and his name had been removed from the seniority list because he had been absent for five consecutive days without advising the company or providing reasons. The letter further indicated that he could be reinstated to the seniority list if he provided satisfactory evidence substantiating the absence and his failure to report. The company's concern was both notification of the absence and substantiation of the reasons for it.

28. The complainant testified that he regarded the matter as very serious – as, of course, it was. His employment was effectively terminated just as it had been three years before. He filed three separate grievances respecting the matter, seeking reinstatement to the seniority list, compensation, redress in the Courts for any remedy beyond the jurisdiction of the arbitrator, apologies, and a direction that George Mitchell, the personnel manager, be disciplined. These written grievances, signed by the complainant, assert that on July 8th he *did* advise the company that he was in hospital, and that on July 5th he mailed a "medical note" explaining his absence. The grievances were drafted by Glen Ryckman, the local plant chairman, in the complainant's presence on the basis of what the complainant told him. They are signed by the complainant himself.

The complainant contends that he told his story and Ryckman included only part of it. This is the same explanation advanced in respect of the OHRC intake officer's alleged failure (relevant only in retrospect) to record certain pertinent information. The complainant contends that he advised Ryckman of other notification to the company – and, in particular, a phone call to George Mitchell himself on July 5th. I do not believe the complainant's evidence on this point. It seems most unlikely that Ryckman would record one call on July 8th, but would omit an earlier and much more important call to the personnel manager himself three days before.

29. The company never received the “medical note” which the complainant maintains he mailed on July 5th. After some discussion with Mitchell, the complainant sent another copy some days later. In reality, the term “medical note” is a misnomer. The document in question is a page from an insurance form apparently used to apply for exemption from insurance payments. It is signed by the complainant's doctor, Dr. Montemuro, and has check marks in the “boxes” indicating both that he is disabled and able to work. The Doctor's writing and intention are difficult to interpret. In any case, the company did not consider this a satisfactory explanation of his absence, nor sufficient reason why he did not notify the company earlier that he would be absent.

30. Mr. Dwyer testified that he learned he was to go into the hospital on Friday, July 2nd. He did not work the following Monday, July 5th. The evidence before the Board further indicates that the complainant was admitted to St. Michael's Hospital at 1:45 p.m. on July 6th. He remained there until the morning of July 9th. This appears to be beyond dispute and, accordingly, the complainant was not available for work on those days. Of course, this, in itself, does not meet the company's other concern about notification of an employee's absence, and the evidence is that Mr. Dwyer had ample opportunity to notify the company had he wished to do so.

31. As the Board has already noted, the complainant contends that his union representatives did not keep him fully informed of the progress of his grievance, and would not permit him to attend the grievance meetings. However, the evidence establishes that there were a number of telephone conversations with various union officials about the matter, and when pressed on cross-examination, the complainant admitted as much. Moreover, I find, as a fact, that it is not the practice of the union and employer to have the grievor present when the grievance is being discussed with company representatives, nor is that practice unreasonable. Persons familiar with the litigation process will know that settlement discussions can often proceed more productively in the absence of the aggrieved individuals, and this is most likely to have been true in the complainant's case. The complainant was in no mood to compromise or co-operate and his presence would likely have only inflamed the situation. Certainly, I do not think a violation of section 68 can be grounded upon a long-standing practice wherein the parties to the collective agreement choose to pursue settlement discussions in the absence of the grievor. There is nothing arbitrary about that practice, nor was their any bad faith or discrimination in following it in Dwyer's case. In any event, the attempt to resolve his grievance was unsuccessful. The company was inclined to believe the grievor's story, and the case proceeded to arbitration.

32. The complainant protests that the employer was not responding to his grievance within the time limits prescribed in the agreement, and the union was not

pressing his position forcefully enough. But the evidence is that both parties had been somewhat flexible in insisting on adherence to the time limits, and, in any case, there was not much that the trade union could do about it. The Board finds no evidence of impropriety in the way the complainant's grievance was processed through the grievance procedure.

33. The position taken by the union on Mr. Dwyer's behalf when meeting with the company, was that he had in fact given sufficient notice of his intended absence. That is what Dwyer had told the union. For their part, the company officials admitted that S. Fortais, the complainant's foreman, had spoken to Mr. Dwyer. But the employer denied that Fortais had been told about the complainant's whereabouts. The company said that Dwyer had been abusive and had said he did not have to reveal his whereabouts and would not do so. The "stories" were in direct conflict. It would be up to the arbitrator to determine the truth of these contradictory positions. The issue before the arbitrator, as before this Board, would involve important findings of credibility. If the company witnesses were believed, the complainant's failure to comply with Article 23(c) would be established.

34. Preliminary investigation and preparation was done at the local level by Glen Ryckman and Dave Gow, the alternate plant chairman who later substantially took over because of Ryckman's heart condition. Gow had some difficulty obtaining the complainant's co-operation because, in the complainant's view, he had a good case and saw no reason why the company should refuse to acknowledge it. The complainant was unwilling to co-operate with Gow because he had already given information about his grievance to Ryckman and because Gow was not an elected official. The local union grievance committee eventually decided to proceed with only one of the complainant's three grievances – the main one concerning his termination – and to use that vehicle to seek his reinstatement with compensation. The grievor's demand for an apology, and his demand that Mitchell be disciplined were considered secondary to getting his job back. There is nothing improper about that conclusion or the way it was reached.

35. The individual who was to present the grievance was Buz Hargrove, an international union representative (ie. unconnected with Mr. Dwyer's local union or its officials), who had never met the complainant before. Hargrove had held a number of positions in the union over the years, had considerable experience with grievance administration, and, at the time, had presented a few arbitration cases. The complainant, as usual, wanted his own lawyer to represent him, but was told that it was not the union's practice to retain counsel except in exceptional cases and this was not one of them. Hargrove advised the complainant that the union would be prepared to allow him to retain his own counsel who would take over the case provided the complainant shouldered the legal costs and was prepared to formally absolve the union of any responsibility in the matter. This apparently was unsatisfactory to Mr. Dwyer and, in consequence, it was Hargrove who eventually presented the case to Arbitrator Hinnegan.

36. The union's case was that Dwyer had advised Fortais at least twice of his whereabouts in various telephone calls. Since two telephone conversations with Fortais were not disputed by the company, and the complainant was in fact in the hospital, the union considered it most unlikely that the matter would not have been mentioned and

expected an arbitrator to take the same view. In addition, Hargrove expected an arbitrator to recognize the obvious injustice of sustaining the discharge of an individual who was in fact in the hospital and unavailable for work. Both Hargrove and the other union officials, however, urged the complainant to get as much evidence on this latter point as possible, including a letter from Dr. Montemuro prepared with the arbitration case in mind indicating he was totally disabled and unable to work. The complainant, content in his own mind about the correctness of his position was reluctant to co-operate. The company's position remained that although the complainant had spoken to Fortais, he had neglected and even refused to reveal where he was.

37. At the hearing, Hargrove led the complainant through his evidence and at the end asked Mr. Dwyer if he had anything further to say. To Hargrove's surprise and chagrin he did: Dwyer claimed that he had talked to Personnel Manager George Mitchell, by telephone, on July 5th, and had specifically advised him that he was going into the hospital on the following day. But there was no mention of a July 5th call on the grievance form, no July 5th call had ever been raised in the grievance procedure, Hargrove had not been told about it, and Hargrove knew that Mitchell would deny it. Hargrove also knew that Mitchell was a relatively new personnel manager who, in his (Hargrove's) estimation, would not be regarded as someone with a grudge against the complainant. Mitchell's denial would mean that the complainant's evidence would be directly contradicted by two company witnesses: Fortais and Mitchell. The testimony about the July 5th call to Mitchell could weigh heavily against Mr. Dwyer.

38. Hargrove asked the Arbitrator for a brief adjournment, indicating that the July 5th call was something new to him which he would like to discuss briefly with the complainant. Privately he was angry, and said to the complainant that he had probably "blown the case". Before, there had been an admission by the company that the complainant had talked to his foreman, and the only question concerned the content of that conversation. Now the case had a new element. However, Ben West, another union official, told Hargrove that although the July 5th call had not been mentioned during the earlier discussions with the company, it had been mentioned at a pre-arbitration meeting of union officials at which Hargrove was present. Hargrove was sure that West was wrong. But if West was prepared to testify, Hargrove concluded that it might be helpful. Hargrove then informed the Arbitrator that if the July 5th call had been raised prior to the arbitration he had failed to note it, and was genuinely surprised, but that West would testify (and did) that the matter was not entirely "new".

39. Arbitrator Hinnegan reviewed the evidence before him and decided to believe the two company officials. In his view, their evidence was not only more credible and mutually supporting, but much more consistent with the pattern of events which had occurred. Accordingly, the Arbitrator found, as a fact, that the complainant had not notified the company in accordance with the requirements of Article 23(c) of the collective agreement and, consequently, that he had lost all his seniority – a result which the parties then assumed meant his termination. The Arbitrator did not consider it appropriate to interfere with that result; and while it is not for this Board to "second-guess" the decision of an arbitrator, it is difficult not to sympathize with the complainant's view that he has been unjustly dealt with – given that he was in the hospital during the relevant period and legitimately unable to work, and had earlier given the company

a blanket medical authorization to make any enquires of his doctors which the company thought necessary. However, the justice of the complainant's position is not for this Board to judge. This is a complaint that his union has acted illegally. It is not an appeal from the arbitration process.

40. There is a problem with the way in which the arbitration award is framed. It appears that the Arbitrator did not fully understand, or at least record with precision, the complainant's evidence respecting the other calls he made and, in particular, the one on July 8th or 9th. At page five of the Arbitrator's award he indicates, that, like the July 5th call, the company only heard of the later call at the hearing. However, the July 8th call was mentioned on the grievance itself, and there was no dispute that the complainant had spoken to Fortais at least twice. Those calls had been discussed during the grievance procedure and it was the union's hope that the Arbitrator would consider it unlikely that the complainant had not mentioned his whereabouts. It is obvious, therefore, that in this respect the Arbitrator's factual finding is wrong. However, it is equally obvious that he considered the complainant's evidence concerning the July 5th call to be false and inconsistent with the pattern of events as well as the testimony of more credible witnesses. Once that issue of credibility was resolved against the grievor his case was in real difficulty.

41. There was considerable evidence before this Board about this crucial July 5th phone call, because part of the complainant's allegation is that Hargrove acted in an arbitrary manner by not raising it, and by reacting as he did when it was raised. The evidence does not support either allegation. The July 5th call was not mentioned on the grievance form, although a July 8th communication was. This omission is hard to explain. The complainant says that it was left out because Ryckman was selective in the information he recorded; but as the Board has already noted, why mention one call but not the other? A call to George Mitchell would be much more important than one to the complainant's supervisor. The complainant was closely cross-examined on this point by company counsel and eventually testified that he did not think the call was important and that it only became significant afterwards because of how the Arbitrator took this particular piece of testimony. But how could the complainant fail to realize the importance of this evidence? He had been discharged before for failing to notify the company, and the previous summer Mitchell himself had written to warn him of the importance of keeping the company informed about his status. Hargrove's evidence was that the July 5th call was never raised with him, and I prefer his evidence to that of the complainant on this point. And, while as the Board has already noted, it is not the province of this Board to second-guess the factual findings of Arbitrator Hinnegan, it is difficult to resist the conclusion that in this important respect at least, he was correct. The evidence concerning the July 5th call appears to be a self-serving fabrication which, in any event, Arbitrator Hinnegan chose not to believe. It was the same kind of unexpected assertion (concerning the alleged racial slurs) which this Board too does not believe, and which casts into doubt Mr. Dwyer's general credibility.

42. The Board further finds that Mr. Dwyer never told Hargrove that his call on July 5th had been overheard by his wife. This particular piece of evidence seems to have surfaced only in this forum to buttress the complainant's allegation that there were witnesses available that the union failed to call, but could have vindicated him. The

complainant admits that in his discussions with Hargrove the latter was anxious to know all the facts and the Board is satisfied that at the time this purported "fact" was not revealed.

43. The complainant's allegations include the assertion that the union should have had Dave Gow present to testify and only failed to do so because of Gow's bad relationship with Mr. Dwyer. No doubt, that is how Mr. Dwyer perceived his relationship with Gow, as with other union officials; but there is nothing to suggest that Gow would have had anything to add to the complainant's case. On the contrary, his evidence before this Board was that he had no recollection of the July 5th call being raised at any time. Had he given that evidence before Arbitrator Hinnegan, it would merely have weakened the complainant's case even further.

44. There is one point on which the evidence indicates that there may have been an error on the union's part – although five years later it is difficult to reach a firm conclusion on the matter. Mr Dwyer's general instruction to his family was that, when dealing with company officials, they should only take messages. They should not volunteer any information. But his daughter, who was a teenager at the time, testified before this Board that on this occasion, when she received a telephone call from supervisor Fortais, she told him that the complainant was in the hospital. Dave Gow's notes of a meeting with the complainant prior to the arbitration suggest that the daughter's availability to testify in this regard was mentioned. But Gow could not remember, nor could Hargrove, who said that as far as he could recall the focus of the discussion was only on the direct conversations between the complainant and Fortais which were then considered quite sufficient (if believed) to sustain the complainant's case. The complainant's position was that he had told Fortais personally at least twice that he was in the hospital.

45. This Board need not express any opinion about the daughter's credibility. Had she given evidence before Arbitrator Hinnegan, her testimony would have had to be considered along with that of the complainant and the other company witnesses. Whether it would have tipped the scales, one can only speculate, but, on balance, it does not seem likely. Still, in hindsight, Hargrove may not have been sufficiently attentive to this aspect of the complainant's case or this potential witness who might have supported it. But in all the circumstances, the Board cannot find that Hargrove's actions can be characterized as being "arbitrary, discriminatory or in bad faith". At most, he may have made an error in judgment in failing to recognize and marshal an additional piece of supporting evidence.

46. Following the arbitration decision, the complainant urged the trade union to seek judicial review and, in fact, some consideration was given to this possibility. Although the decision of the Arbitrator is by statute and the terms of the agreement intended to be "final and binding", the union thought that the result was unfair, given the fact that the complainant was in the hospital and Arbitrator Hinnegan had made some factual errors. Some consideration was also given to his interpretation of Article 23(c), although it is not entirely clear whether this occurred before the complainant sought the assistance of his own counsel. In any case, the union decided not to launch or join an application for judicial review, and this alleged default forms part of the instant complaint – especially since that application for review was eventually successful.

47. But what was the prospect for review as it then appeared to the union? Hinnegan had made some factual errors, but it was unlikely that this would be sufficient to overturn his decision. And the interpretation which ultimately found favour in the Divisional Court was not one which the union thought was correct or which in good faith it believed it could assert. That is why it chose not to participate in the application for judicial review and that is why there was some confusion following the Divisional Court's decision as to what that decision actually meant.

48. Article 23(c) – the so-called “contractual quit” or “abandonment” provision – is a standard clause in automobile industry collective agreements, including those with Chrysler. It has been part of those agreements for many years and has developed a well-established and accepted meaning: a loss of seniority was considered to result in automatic termination of employment with reinstatement if the employer accepted the employee's substantiation for his absence. The fairness of that provision is not at issue here. The fact is, that there have been literally hundreds of cases involving Article 23(c), and the parties to the agreement have always (prior to the Divisional Court decision) treated a loss of seniority as meaning a loss of employment. The evidence before me was overwhelming and uncontradicted in this regard, and the complainant did not seriously challenge it. All of the union officials who gave evidence confirmed that this was the case – especially Hargrove, who, for some years, has had responsibility for negotiating the Chrysler collective agreement. That is what the parties intended, and that is why the union never raised the issue before Arbitrator Hinnegan. Indeed, as Arbitrator J. D. O'Shea Q.C. noted in his second arbitration award, when the issue was raised in an earlier U.A.W. arbitration case involving similar language in a collective agreement with Fruehauf Trailers Limited, Arbitrator A.M. Linden, Q.C., (as he then was) had this to say:

It was contended by counsel for the union that the loss of seniority rights did not necessarily imply termination and that Mr. Tomec might be considered a probationary employee. This argument is not supported by the jurisprudence which is to the opposite effect. I hold, therefore, that implicit in a total loss of seniority is the loss of employee status, that is a termination of employment.

That opinion was expressed on September 22, 1977, some seven months before the Divisional Court expressed the opinion that this interpretation was one which the language of Article 23(c) could not reasonably bear.

49. In view of the arbitral jurisprudence and the practice of the parties, the union did not think that, in good faith, it could assert an interpretation which it knew was not how the parties had applied their agreement or intended it to operate; nor, for this reason, did it participate in the complainant's application for judicial review. Whatever interpretations or arguments were possible on the language of Article 23(c), if questioned, the union would have had to concede that the interpretation proposed by the complainant was not what the parties had previously taken their agreement to mean. When the Divisional Court quashed the Hinnegan award on the basis that this interpretation was unreasonable, no one was more surprised than the union officials.

50. The Divisional Court affirmed Arbitrator Hinnegan's findings of fact and credibility, as well as his determination that Article 23(c) resulted in a total loss of

seniority. But the Court quashed the Hinnegan award on the ground that its result was premised upon an interpretation of Article 23(c), which the language of that section could not reasonably bear. The Court then remitted the matter back to another arbitrator as follows:

We therefore quash the decision of the arbitrator, but because there is no evidence before us about any "discharge" or "termination" or the circumstances therefore, we do not believe that we can deal with this matter in any other way than by remitting it back to another arbitrator to be dealt with in accordance with fresh evidence on these matters and in accordance with the interpretation which we articulate herein. [i.e., that a total loss of seniority is not equivalent to a discharge.]

It remained for the new Arbitrator to determine the propriety of the complainant's termination in accordance with the Court's instructions, and his interpretation of the rights under the collective agreement of a person without any seniority.

V – The 1978 Arbitration

51. Following the Divisional Court decision there was some confusion about how to proceed. By the time the Court of Appeal had refused the company's leave to appeal, almost two years had passed since the complainant's termination. The scope of the second Arbitrator's enquiry was unclear, and by this time Hargrove had moved on to another job. There was some discussion between the International Union and its solicitors as well as the local union officials as to how best to proceed. Eventually, J. D. O'Shea, Q.C. was selected as the new Arbitrator, and Ed. Bruce, an International representative for the union, was chosen to present the case.

52. Ed. Bruce was an experienced union representative. He had been an official of the union for many years, including eight years as president of the Ford local. Apart from any formal training he had received, his experience included the presentation of many arbitration cases. He had never met the complainant before nor, prior to this assignment, had he heard about him. The grievor, as before, wanted his own lawyer. Once again, he was told that it was not the union's practice to retain counsel in arbitration matters, but that the appropriate channel of appeal was through the union's constitution and its senior elected officers.

53. Bruce met with the complainant to go over his case and hoped that the Divisional Court decision would give him sufficient leverage to introduce new evidence on the merits of the complainant's discharge. Bruce consulted Hargrove, the local union officials, and the complainant himself, and the complainant's daughter attended at the hearing just in case the Arbitrator might be persuaded to re-open the hearing *de novo*. Mr. Dwyer claims, *inter alia*, that Ed. Bruce intentionally "threw the case". Mr. Dwyer contends that Bruce promised him that he would argue that Mr. Dwyer was in the position of an employee with ninety-one days' seniority (i.e., just past the probationary period and having the right to grieve a termination under the collective agreement), while at the hearing the complainant maintains that Bruce argued that the complainant

was an individual without seniority and without any rights to grieve at all. The Board rejects that contention. It makes no sense and is entirely inconsistent with Bruce's version of events – a version which the Board prefers over of the complainant. Bruce did not submit that the complainant was without rights. Bruce did not know precisely what the complainant's position was. The complainant was without seniority according to Article 23, and in this respect the Divisional Court had affirmed the Arbitrator's decision; but to say that he was beyond his ninety-day probationary period could, under the terms of the collective agreement, imply that he had seniority. Yet Article 23(c) suggested he had none. Bruce was content to leave the matter to the Arbitrator, although when questioned by Mr. O'Shea, he candidly admitted that *prior to the Divisional Court decision* the union had been reluctant to challenge the company's position that a total loss of seniority was equivalent to a termination or quit because an employee without any seniority at all could be in the same position as an employee who, having failed to accumulate ninety days of service under the agreement, had no seniority rights and no right to grieve his termination. And, of course, this response to the Arbitrator's question must be measured against the fact that, as Bruce well knew, the union and the company did view a loss of seniority as tantamount to a termination. It was the Divisional Court decision which created the anomaly in respect of a previously accepted interpretation of the parties' agreement.

54. The Board rejects the complainant's contention that Bruce intentionally changed his argument or "threw the case", or that he acted in an arbitrary manner. He tried to have the matter retried, *de novo*, and when he was unsuccessful, he parried the arbitrator's question, and submitted as best he could, that in accordance with the Divisional Court endorsement, the company had not affirmatively demonstrated that it had discharged the complainant. That is why he consented to an adjournment (which the complainant argues he should not have done) to permit the production of the company's separation slip. Bruce knew that in accordance with the company's usual practice, the separation slip would indicate, as it does, that the complainant had "quit", whereas at the arbitration the company would argue that he had been terminated. In the result, however, and for the reasons set out in the decision dated October 23, 1978, Mr. O'Shea upheld the complainant's discharge once again. He concluded that, apart altogether from the operation of Article 23(c), positive steps had been taken to sever the complainant's employment relationship, and that as an employee without any seniority at all, the complainant was in no better position than a probationary employee. As such he had no right to grieve his termination. The correctness of that determination is not at issue here.

55. The O'Shea award was also taken to the Divisional Court, but this time the union participated. The evidence indicates that in view of what had happened on the previous occasion and the potential ramifications for other agreements and bargaining units, the union thought it would be best to appear and argue in support of the complainant's position that the O'Shea decision was wrong. Mr. Dwyer, who was unhappy that the union did not participate in his first case, complains to this Board that the union "Took over" his second application for judicial review. Be that as it may, the second application was dismissed. It is but one of the many ironies of this case that the reasons for the dismissal included certain observations by the Court which, if applied on the earlier application for judicial review, would have occasioned a different result. Leave to appeal to the Court of Appeal was refused and, about a year later, Mr. Dwyer

reformulated his complaint as one against his trade union and brought the matter before this Board.

VI – Conclusion

56. On the basis of the evidence before the Board, it cannot conclude that there was any bad faith or discrimination in the way in which the complainant was represented by the various union officials who were associated with his complaint over the years. There was certainly no malice or conspiracy of the kind which the complainant adverted to in his evidence. The union officials did their best to deal with a difficult situation and were not at all unsympathetic to the complainant's plea that he had been unfairly dealt with. The Board does not find that there was any impropriety in the way in which the complainant was dealt with prior to his arbitration before Hinnegan, nor does the Board find any breach of the union's statutory duty in the way in which the arbitration case was presented. Similarly, the Board finds no breach of the law in the way in which the complainant was represented prior to and during his second arbitration hearing. In either case, it may be that his position would have been promoted somewhat differently by independent counsel, but the Board does not think that the failure to provide independent counsel constitutes a breach of section 68 of the Act anymore than does the union's failure to join in or initiate the first application for judicial review. Apart altogether from the expense involved, the whole purpose of the grievance procedure is to provide an informal and relatively expeditious means of resolving employee complaints without recourse to the procedures or formalities appropriate in the Courts – where, of course, at common law, there was no right to reinstatement anyway. It would be anomalous in this context if, in the absence of exceptional circumstances, this Board were to hold that the failure to retain counsel was a breach of the law or the failure to pursue a judicial review, constituted a form of illegal conduct. Neither the facts of this case, nor considerations of general policy support such position.

57. The Act proscribes conduct which may be characterized as “arbitrary, discriminatory, or in bad faith”, and there is seldom much difficulty discerning actions which fall into the latter two categories. The problem lies in determining the intended ambit of the elastic word “arbitrary” – bearing in mind that a union's affairs will be conducted by laymen, often elected, who may have little formal education and certainly are unlikely to have any formal legal training. In recognition of this fact, the Board has construed the term “arbitrary” to refer to conduct which is superficial, capricious, cursory, grossly negligent, implausible or flagrant. Section 68 has not been held to extend to honest mistakes or errors in judgment. In *Ford Motor Company Limited*, [1973] OLRB Rep. Oct. 519, the Board put it this way:

40. In deciding whether a union has violated the Act the standards to be applied are important. We recognize that union affairs are conducted for the most part by laymen. In some situations there are experienced full time officials of a trade union who conduct the union affairs; in other situations, the union affairs are conducted by employees in their spare time, while in yet other situations employees may be given a limited amount of paid time by their employers to engage in trade union matters. This Board does not decide cases on the basis of whether a mistake may have been

made or whether there was negligence, nor is the standard based on what this Board might have done in a particular situation after having the leisure and time to reflect upon the merits. Rather, the standard must consider the persons who are performing the collective bargaining functions, the norms of the industrial community and the measures and solutions that have gained acceptance within that community; see *Fisher v. Pemberton et al.* 8 D.L.R. (3d) at 521 at p. 546.

Similarly, in *Walter Prinesdomu*, [1975] OLRB Rep. May 444 the Board observed:

In using the word arbitrary both the United States Supreme Court and the Legislature of this Province must have envisaged the duty constituting more than the simple castigation of subjective ill-will in that any other interpretation would render the use of this word superfluous. Thus, a well known rule of both statutory and contractual construction militates against the respondent's particular submissions in this regard.

But where does this path lead? Some insight is gained from the *Vaca* case wherein Mr. Justice White juxtaposed the word arbitrary with the word "perfunctory" and observed that a trade union, "in a non arbitrary manner [must] make decisions as to the merits of particular grievances". It could be said that this description of the duty requires the exclusive bargaining agent to put "its mind" to the merits of a grievance and attempt to engage in a process of rational decision-making that cannot be branded as implausible or capricious.

26. This approach gives the word arbitrary some independent meaning beyond subjective ill-will, but, at the same time, it lacks any precise parameters and thus is extremely difficult to apply. Moreover, attempts at a more precise adumbration have to reconcile the apparent consensus that it is necessary to distinguish arbitrariness (whatever it means) from mere errors in judgment, mistakes, negligence and unbecoming laxness...

On the other hand we do not believe, at least at this time, that all mistakes and careless conduct by trade union officials fall outside the scope of section 60. It may be difficult to elaborate the precise meaning of arbitrary representation in advance but, as noted above, the very use of the word suggests that some regulation of the quality of decision-making was intended. Accordingly at least flagrant errors in processing grievances-errors consistent with a "not caring" attitude must be inconsistent with the duty of fair representation. An approach to a grievance may be wrong or a provision inadvertently overlooked and section 60 has no application. The duty is not designed to remedy these kinds of errors. But when the importance of the grievance is taken into account and the experience and

identity of the decision-maker ascertained the Board may decide that a course of conduct is so implausible, so summary or so reckless to be unworthy of protection. Such circumstances cannot and should not be distinguished from a blind refusal to consider the complaint. However, each case must be decided on its own peculiar facts and it is clear that the duty is not going to be a fertile field for the individual adversely affected by less flagrant conduct.

(See also: *I.T.E. Industries Ltd.*, [1980] OLRB Rep. June 1001.)

58. Can it be said that any of the conduct of which Mr. Dwyer complains falls within those parameters? In my view, the answer is clearly no. It cannot be considered arbitrary if a union decides to follow its established practice and handle grievances with its own officials rather than retain outside counsel. This practice is very common in the industrial community and as the Court of Appeal has recently reminded us [see: *Corporation of the City of Toronto v. C.U.P.E. Local 79*, 82 CLLC ¶14174] the arbitration process frequently involves laymen and was intended, so far as possible, to be conducted without undue "legalism". The fact that Mr. Dwyer demanded his own lawyer does not mean that the union acted arbitrarily when it refused to accede to that demand. Nor given the contractual and legislative requirement that the arbitration process be final and binding, should this board readily infer that section 68 creates an obligation to seek judicial review or that a trade union acts improperly when it declines to do so. There may be exceptional circumstances where an arbitrator's award is so perverse and pervasive in effect, that regardless of the expense, a union might be considered to be acting arbitrarily if it did not seek review. But that would be a highly exceptional case – unlike the present one. Here there is no basis for the argument that the union acted arbitrarily by declining to finance or participate in a review of the Hinnegan award, or by declining to provide Mr. Dwyer with his own lawyer. Put at its very highest, the credible evidence before the Board discloses no more than that union representatives may have made an honest mistake, or during a hearing may not have responded with the aplomb of Mr. Dwyer's present counsel in response to his unexpected assertions made at his hearing. However, having regard to totality of the evidence, the Board is not satisfied that a breach of section 68 has been made out.

VII – Delay

59. The complainant's discharge occurred in July, 1976. His first arbitration hearing took place in December, 1976. His second arbitration hearing took place in the Fall of 1978. The present complaint was not filed until April 24, 1981 – four and a half years after the first arbitration hearing, two and a half years after the second arbitration hearing, and a year after the related judicial proceedings had been completed. Moreover, the complainant testified that he was concerned about the quality of representation from the start. That is why he requested that the union provide him with independent legal advice. A letter from his counsel dated May 19, 1978 appears to confirm that before that time he had indicated his reservations about the union's role; and, during this period, the complainant was not without legal advice. But no allegation of misconduct was formulated against Hargrove, Gow, Ryckman, and Bruce, until years later. Nor can it be said that the complainant was unfamiliar with the options open to

him. He had, after all, complained to the Board before when he was dissatisfied about the way that a grievance had been handled by the union.

60. The union and the company both argued that it is simply too late to grant the complainant any relief at all, and it would be inequitable to do so. Having failed in his various attempts to fix the company with liability he cannot now, years later, switch targets and reformulate his case so as to bring it within this Board's jurisdiction. The union has asserted throughout this proceeding that it is patently unfair to have to defend against allegations of misconduct made years after the precipitating events; and the company asserts that having defended its position before Arbitrator Hinnegan, before Arbitrator O'Shea, before the Divisional Court (twice), and before the Ontario Human Rights Commission, it should not have to risk liability once more. The company argues that it would be impossible after six years to retry the complainant's original termination on its merits. Not only have documents been disposed of and recollections faded (a problem which was evident throughout the present proceeding – see the interim decision of the Board issued March 12, 1982 which, it might be noted, was incorrectly dated March 12, 1981), but essential witnesses may no longer be available. Some individuals have left the company's employ, and Dr. Montemurro, has since died. But it was Dr. Montemurro who signed the equivocal insurance document and who might have been in the best position to assess the complainant's state of health, and, in retrospect, whether he would have actually been available and able to work after his purported termination in July, 1976. If he were not, he would not be entitled to full compensation should it be determined that he was improperly discharged in July, 1976. That was the issue before Arbitrator Rayner in 1973–74. Nor, of course, would the trade union be liable for that amount. The company argues that no remedy should issue at all, or, in the alternative, that any remedy emanating from this proceeding should run solely against the union. The union asserts that the complainant's present predicament stems directly from his credibility problem before Arbitrator Hinnegan, and regardless of any deficiencies which the Board might, in hindsight, find in the quality of representation, Mr. Dwyer himself remains largely responsible for his present plight. In the union's submission, it is simply too easy, with hindsight, after the fact, to blame one's counsel for losing a case or to assert that there was evidence which, if tendered, might have affected the outcome. And given the extreme delay it is very difficult to defend against such allegations.

61. The argument respecting delay was first raised before the Board (differently constituted) as a preliminary matter precluding any enquiry into Mr. Dwyer's complaint at all. That panel of the Board, without formal reasons, decided that the Board should hear the complaint on its merits, but that the question of delay would be a factor to be considered in determining what remedy, if any, would issue in the event that the allegations were sustained and held to be a breach of section 68. That important qualification was repeated when the matter came on for a hearing on the merits and the union and company sought reconsideration of the earlier Board decision. Moreover, it must be noted, that had the Board's approach to delay been elaborated, as it subsequently was in *Sheller Globe of Canada Ltd.*, [1982] OLRB Rep. Jan. 113, and *Corporation of the City of Mississauga*, [1982] OLRB Rep. March 420, it is arguable that this complaint would not have been entertained at all. It is difficult to accept that the Legislature ever envisaged that an unfair labour practice, once crystallized, could

exist indefinitely in a state of suspended animation, to be revived years later as the basis for litigation. Adversarial relationships are pervasive enough in our collective bargaining system without the resurrection of ghosts from the past. In any event, the Board did hear the complaint, and determined, on the evidence, that there had been no breach of section 68 of the Act. It is therefore unnecessary to express any opinion about how the Board would have dealt with the problem of delay or the question of liability, had the Board been persuaded that in some respect or other, a breach of section 68 had been established.

62. For the foregoing reasons, the complaint is dismissed.

0486-82-R W. Thomas Arnold, Applicant, v. Retail Commercial and Industrial Union, Local 206 Chartered by the United Food and Commercial Worker International, Respondent, v. **Comstock Funeral Home Ltd.**, Intervener

Practice and Procedure – Termination – Timeliness – One year bar on termination applications after certification – Whether year runs from date of interim or final certificate

BEFORE: M. G. Picher, Vice-Chairman, and Board Members W. H. Wightman and S. Cooke.

APPEARANCES: *Donald D. White, W. Thomas Arnold, Tim English and Norm Massie for the applicant; Raj Anand, Charles William McCormick, Jack Colvin and Vic Surerus for the respondent; Steven J. McCormack, F. R. von Veh and J. Hotston for the intervener.*

DECISION OF M. G. PICHER, VICE-CHAIRMAN AND BOARD MEMBER S. COOKE; October 12, 1982

1. This is an application for the termination of bargaining rights under section 57(1) of the *Labour Relations Act*. That section provides as follows:

If a trade union does not make a collective agreement with the employer within one year after its certification, any of the employees in the bargaining unit determined in the certificate may, subject to section 61, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit.

2. The issue raised in this application is whether the period of one year after certification referred to in section 57(1) is to be calculated from the date of interim certification or from the date on which a final board certificate has issued.

3. This application was filed on June 9, 1982. It is common ground that interim certification was granted to the respondent for a bargaining unit of all employees of the Comstock Funeral Home, save management and part-time employees, on May 25, 1981. Interim certification issued pursuant to Section 6(2) of the Act which provides:

Where, upon an application for certification, the Board is satisfied that any dispute as to the composition of the bargaining unit cannot affect the trade union's right to certification, the Board may certify the trade union as the bargaining agent pending the final resolution of the composition of the bargaining unit.

4. On the date of the certification hearing the parties were disagreed as to the employment status of Ms. Cathy Simonds, classified as "Secretary to the Home". That matter was referred to a Labour Relations Officer. Subsequently the parties themselves settled the issue of the secretary's status, agreeing that she should be included in the bargaining unit. No further issues being outstanding the Board issued a certificate on June 30, 1981. Notice to bargain was given to the employer on June 4, 1981. No collective agreement has been concluded since then.

5. The respondent union submits that no application under section 57(1) for the termination of its bargaining rights could be filed until June 30, 1982, and that the instant application, being filed on June 9, 1982, is untimely and must therefore be dismissed. Counsel for the applicant and for the intervener employer submit that an application for the termination of the union's bargaining rights can be brought any time after the expiry of one year from the date of interim certification. The issue raised is before the Board apparently for the first time since section 6(2) was introduced into the Act in 1975. Given the importance of the timeliness issue in this case, the Board requested written argument from the parties.

6. Counsel for the applicant and for the employer submit that "certification" in section 57(1) must be read as including interim certification. They submit that the union is given a full year to bargaining a collective agreement from the date of interim certification and that in the contemplation of the Act it is open to employees to seek to terminate bargaining rights if a collective agreement has not been made in that time. Since the employer is bound to bargain in good faith with the union after interim certification it would, in their view, be inconsistent with the scheme of the Act to calculate the eligibility date for a termination application from a different certification date. Section 14 of the Act gives a union the obligation to give written notice of its desire to bargain "following certification". The Board has concluded that certification in that section includes interim certification under section 6(2), and that bargaining for a first collective agreement should generally commence from that point, notwithstanding the unresolved issue of the composition of the bargaining unit. (*City of Mississauga Public Library Board*, [1976] OLRB Rep. Feb. 2.) The applicant and intervener submit that it would be inconsistent to give the word "certification" different meanings as applied to sections 14 and 57 of the Act.

7. Counsel for the respondent submits that to read the word "certification" in section 57(1) of the Act to include interim certification would be out of keeping with

the realities of collective bargaining and inconsistent with the true intention of the Act. He also submits that the language of section 57(1) supports the conclusion that a formal certificate must have issued for a full year before a termination application can be entertained. His argument appears to rely on the fact that there is no such thing as an "interim certificate", the only certificate issued by the Board being the final, formal certificate that concludes an application for certification. On this point counsel for the union submits:

This section clearly contemplates that the application is to be made after the expiry of one year from the date of the formal certificate. The phrase "any of the employees in the bargaining unit determined in the certificate" is explicit with respect to who can make the application, and until a formal certificate is issued there is no "bargaining unit determined in the certificate". At the date of interim certification there is still doubt about the composition of the bargaining unit, and hence the year should only start running at the date of the formal certificate, when the bargaining unit composition has been determined.

8. Counsel for the union also submits that it would be inequitable to entertain a request for a vote under section 57(3) of the Act where a year has not expired from the issuing of a formal certificate. To do so would, he argues, force employees who might only have been determined to be included in the unit well after interim certification, to vote at a time when they have not been participating members of the bargaining unit for a full year. In his submission the Act contemplates that all employees in a bargaining unit should have a full year to decide whether to continue or terminate their union's bargaining rights or, implicitly it seems to the Board, to seek another bargaining agent.

9. The union also submits that its own ability to bargain a collective agreement is prejudiced if the clock for termination begins to run when the final composition of the unit is still unresolved:

Interim certification allows the trade union to commence bargaining with the employer, but the trade union can only commence bargaining on behalf of the employees who are in the unit at that time. The trade union's ability to bargain on certain items is greatly restricted when it does not know the final composition of the unit, and it cannot bargain on any items for employees who are not in the unit at the time of interim certification and who are subsequently included by the formal certificate. It is, of course, impossible for a trade union to finalize a collective agreement with the employer at this time. The Board recognized the difficulties inherent in bargaining after interim certification in *City of Mississauga Public Library Board*, (1976) OLRB Rep. (Feb) 1.

In the case before the Board, six weeks elapsed between the granting of interim certification and the issuance of a formal certificate. However, it is not unusual for six months to elapse (see *Trent University Board of Governors*, (1980) OLRB Rep. (June)

922; *Weight Loss Inc.*, (1980) OLRB Rep. (Dec) 1841; and *Children's Aid Society of Metropolitan Toronto*, (1978) OLRB Rep. (Jan) 98), or even for eight months to elapse (see *Windsor Arms Hotel*, (1978) OLRB Rep. (May) 472). In these circumstances, the time in which the union is able to bargain on behalf of some employees in the bargaining unit determined in the certificate would be sharply decreased if the one year period commenced at the date of interim certification.

In *University of Windsor*, [1977] OLRB Rep. (May) 300, an interim certificate was issued on May 11th, 1976, and a formal certificate (which included the person in dispute as a member of the bargaining unit) was issued on May 9th, 1977. If an application for decertification could have been made after the expiry of one year from the interim certification, the union would only have had two days in which to negotiate a collective agreement which included provisions covering the disputed employee.

In *York University* (1977) OLRB Rep. (Oct) 611, interim certification was granted on April 6th, 1976, and the formal certificate was issued on October 18th, 1977. Hence, eighteen months elapsed between the two dates. It would be anomalous to formulate a rule that the one year period starts running at the date of interim certification when the results would be that the union could be decertified even before it had obtained its formal certificate and before it had the status to make a collective agreement.

10. Counsel for the union submits that nothing should be allowed to abridge the time which a union has in which to make a first collective agreement. He submits that that is especially so where, as in the instant case, the Board has found that the employer has resorted to unfair labour practices and "has engaged in a persistent pattern of anti-union conduct in response to its employees' decision to become organized" (See, decision report at [1981] OLRB Rep. Dec. 1755) In this regard he submits:

While recognizing that the Board has held that it has no discretion to extend the one-year period because of an employer's failure to bargain in good faith, it is submitted that the Board should be cognizant of the employer's deliberate attempts to thwart the wishes of its employees and the efforts of the trade union, and should be extremely cautious not to do anything which may hinder the trade union further. The Board must decide at which of the two dates the one-year period commences, and the respondent argues that the later date should be chosen so as not to allow the employer's actions to prejudice the trade union any more than it has already been.

11. As real as these last concerns may be to the respondent union, the Board obviously cannot give content to the general words of the Act based on the equities of the particular case before it. That is not to say, however, that where the language of the

Act is open to two possible interpretations, as it is here, the Board may not look to the policy implications of either interpretation. As the body responsible for the administration of the Act it must choose the alternative most consistent with the objects of the Act and the general intention of the Legislature.

12. Interim certification was introduced as a means to overcome the difficulty of stagnation in a union's campaign to represent employees. The period immediately following the filing of an application for certification is critical for the success of a union. Prior to the 197 amendments to the Act a union's application for certification could be held up indefinitely pending litigation over the description of the bargaining unit, even though it was plain that it would eventually emerge with a certificate and the right to represent a unit of employees. Support for a union that has promised to work for the betterment of wages and working conditions naturally diminishes among employees who can see no bargaining going on their behalf weeks and sometimes months after they have given their support to the union's certification drive. Any delay in the collective bargaining process, like a delay in certification or in the taking of a representation vote, generally works to the disadvantage of a union. That is the reality that underlies the comment of Estey C.J.O. (as he was then) in *Journal Publishing Company of Ottawa Ltd. et al. v. The Ottawa Newspaper Guild, Local 205 et al.*, (decision declining leave to appeal, unreported, Ontario Court of Appeal, March 31, 1977):

In the law which has grown up around labour relations in this province, and indeed elsewhere where the common law is pursued, the overriding principle invariably applied is that labour relations delayed are labour relations defeated and denied.

(See also Innis Christie, "Certification - is there a better way to test employee wishes?" *The Direction of Labour Policy in Canada*, Frances Bairstow, editor (Montreal: McGill University Industrial Relations Centre, 1977, 51).)

13. The sole purpose of section 6(2) of the Act is to get the union started on the road to bargaining on behalf of employees as soon as it is clear that its numerical support among the employees will ensure the eventual granting of a certificate. The Board recognized early on, however, that interim certification will not necessarily give a union the ability to bargaining fully on all issues and that its ability to make a collective agreement may have to await a final clarification of the composition of the bargaining unit. It did not see that, however, as a reason to deny interim certification. In the *City of Mississauga Public Library Board* the Board commented (at p. 3):

The legislative intent of section [6(2)] is to permit the parties to proceed with those aspects of bargaining which are not dependent on a final resolution of bargaining unit disputes so as not to delay the onset of the already lengthy bargaining process. The Board ought not to withhold interim certification on the grounds that the bargaining unit dispute precludes the negotiation of certain items or precludes a conclusion of negotiations.

14. As the foregoing passage makes clear, section 6(2) of the Act is conceived as giving a union the right to commence bargaining to the extent that bargaining can get

started. It is not, however, a section that puts a final definition to a union's bargaining rights. On the contrary, the final measure of a union's rights are in abeyance when interim certification is granted. It cannot then be said with any certainty that the union has achieved the full measure of its rights. Significantly, in cases where the unresolved dispute over the bargaining unit involve a substantial number of employees or even a small number of key employees whose participation in a strike would be critical, the bargaining strength of the union may be appreciably less during interim certification than it would be after the issuing of a final certificate which has the effect of including those critical employees in the ranks of the bargaining unit. As the Board recognized in the *City of Mississauga Public Library Board* case, bargaining under interim certification may be significantly circumscribed; a union awaiting the final determination as to which employees it represents may not be in a position to make a collective agreement. Its full bargaining rights and the measure of its ultimate bargaining power may well have to await the issuing of the Board's final certificate.

15. There are two forms of certification under the Act, each with its own purpose. When the provisions of section 6(2) are viewed in this context, we see nothing inconsistent in the interpretation of the word "certification" in section 14 of the Act as requiring bargaining to commence after interim certification and in section 57(1) to contemplate a period of one year from the granting of a final certificate. Each section is directed to a different end: the first eliminates any prejudice to a union by getting the process of bargaining under way as quickly as possible during the period of high employee expectations surrounding certification; the second assures that the union has a clear period of one year in which to convert its bargaining rights into a collective agreement for all of the employees it represents. For the reasons outlined above, it appears to be Board that this last end can be fully achieved only after the union's bargaining rights are finally determined in a Board certificate. We must agree with counsel for the union that it would be anomalous in those cases involving extensive examinations and litigation over the final composition of the bargaining unit – occasionally extending more than a year after interim certification – for a union's bargaining rights to be terminated before they have been conclusively defined and certified.

16. Counsel for all parties rightly point out from their respective points of view that the calculation of the open period for termination applications or for displacement applications by rival unions will have an impact on the right of employees and of other unions to challenge existing bargaining rights, as it will on the period that employees will have to participate in the bargaining process. While it is true that the rights of employees and other unions will be incidentally affected by the certification timetable, we see in that nothing unusual or prejudicial. The rights of those same parties could vary with respect to timing just as much before the introduction of interim certification into the Act. The granting of certificates and the commencement of the one year period always had to await the indefinite date of a final certificate and could vary from case to case.

17. There is nothing unusual or sinister in that. The rights of employees and other unions are similarly affected by other timing provisions of the Act. When for example, a three year collective agreement is signed, an employee's right to apply for a termination of bargaining rights is stayed for thirty-four months whereas it could be exercised after ten months of a collective agreement whose term is for one year. The scheme of the Act builds-in considerable flexibility, allowing considerable latitude in

the timing of individual rights depending on the settlements made, or not made, by the parties to collective bargaining. While the same general rights and duties devolve on all employees and unions under the Act, the timing and duration of the period when those rights may be exercised will vary according to the context of particular cases. We are not, therefore, inclined to give great weight to the argument of the union that all employees should be assumed to have the right to participate in the affairs of a bargaining unit for at least one year or to the similar argument of the applicant and employer that no employee should be required to wait more than a year before he can exercise his right to apply for a termination of a union's bargaining rights. In our view, both sections 6(2) and 57 are enacted to give minimal rights and protections to trade unions that have been certified, and they should be interpreted in that light. While the rights of employees and other unions are necessarily the opposite side of the coin, to interpret those provisions primarily from the perspective of individual employees or third party unions is tantamount to looking at those sections through the wrong end of the telescope.

18. The purpose of section 57(1) is to assure a minimal degree of stability in bargaining rights. It guarantees that any union certified has a full year to represent the employees described in a certificate without fear of termination. For the reasons canvassed above, to interpret the open period in section 57(1) as running by reference to interim certification would prejudice that stability considerably. In a statute dedicated to the establishment and preservation of collective bargaining rights, such an interpretation would have a curiously negative effect. It would place a premium on delay in the certification process: an employer bent on defeating a union's bargaining rights would have every reason to force a union into interim certification. With little imagination it could raise objections to the composition of the bargaining unit with a view to holding up the examination process as long as possible while, over time, employee support slowly ebbed from a union apparently unable to finalize its bargaining rights and secure a collective agreement. That would be a result, in our view, inconsistent with the general scheme and purpose of the *Labour Relations Act* and directly contrary to the specific purpose of section 6(2).

19. The language of the Act also supports the conclusion that it intends bargaining rights to be terminable only one year after the granting of a final board certificate. Bearing in mind that there is no such document as an "interim certificate" issued by the Board, but only interim certification by a Board decision, it is significant that section 57(1) provides that an application for termination may be made only by "any of the employees in the bargaining unit *determined in the certificate*" (emphasis added). There is a clear distinction, recognized by the Board, between the bargaining unit that is subject to interim certification, which invariably excludes persons whose status is in dispute, and the bargaining unit described in the ultimate certificate which is finally issued by the Board, (see, *University of Ottawa*, [1975] OLRB Rep. Sept. 694 at 698). The granting of a formal Board certificate is contemplated as a precondition to the filing of an application for the termination of bargaining rights under section 57(1). When, in exceptional cases like *York University*, cited above, the formal certificate issues more than one year after interim certification, there can obviously be no reference to "employees in the bargaining unit determined in the certificate" until the certificate itself has issued. There could not, in other words, be any employee so qualified on the anniversary date of interim certification. That, in our view, supports the conclusion that

the one year period in section 57(1) should be computed from the date of the certificate referred to in the same section. That was clearly the case before section 6(2) was enacted. We do not see why a trade union should be in a worse position in the protection of its bargaining rights because of the introduction of section 6(2).

20. It is worth noting that other provisions of the Act also contemplate the granting of a formal certificate as a precondition to their operation. Section 61 of the Act, which determines the time at which one union may apply to displace the bargaining rights of another, contemplates the pre-existence of a formal certificate. It provides, in part,

61.-(1) Subject to subsection (3), where a trade union has not made a collective agreement within one year after its certification and the Minister has appointed a conciliation officer or a mediator under this Act, no application for certification of a bargaining agent of, or for a declaration that a trade union no longer represents, the employees in the bargaining unit *determined in the certificate* shall be made until,

(a) thirty days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator; or

(b) thirty days have elapsed after the Minister has released to the parties a notice that he does not consider it advisable to appoint a conciliation board; or

(c) six months have elapsed after the Minister has released to the parties a notice of a report of the conciliation officer that the differences between the parties concerning the terms of a collective agreement have been settled,

as the case may be.

(3) Where a trade union has given notice under section 14 and the employees in the bargaining unit on whose behalf the trade union was certified as bargaining agent thereafter engage in a lawful strike or the employer lawfully locks out such employees, no application for certification of a bargaining agent of, or for a declaration that the trade union no longer represents, the employees in the bargaining unit *determined in the certificate* shall be made,

(a) until six months have elapsed after the strike or lock-out commenced; or

(b) until seven months have elapsed after the Minister has released to the parties the report of the conciliation board or

mediator or a notice that the Minister does not consider it advisable to appoint a conciliation board,

whichever occurs first.

(emphasis added)

21. Perhaps the clearest and most compelling section of the Act on this issue is section 5(2), which governs the time at which one trade union may apply to displace the bargaining rights of another. It provides:

5-(2) Where a trade union has been certified as bargaining agent of the employees of an employer in a bargaining unit and has not entered into a collective agreement with the employer and no declaration has been made by the Board that the trade union no longer represents the employees in the bargaining unit, another trade union may, subject to section 61, apply to the Board for certification as bargaining agent of any of the employees in the bargaining unit determined in the certificate *only after the expiration of one year from the date of the certificate.*

(emphasis added)

It is plain that employees who want to terminate a union's bargaining rights by shifting their allegiance to another union cannot do so after one year from the interim certification of the incumbent union. The union acting for them must await a full year from the date of the formal certificate issued to the union that holds the bargaining rights. If the applicant's interpretation of section 57(1) holds, however, the same employees and their new union could do indirectly what they cannot do directly, by bringing an employee sponsored application for termination under section 57(1) on the anniversary date of interim certification, thereby opening the way for an application by their new union.

22. In our view, that possibility would not only defeat the stated intention of section 5(2) of the Act, but would introduce a genuine inconsistency in its provisions. The extinguishment of bargaining rights under the Act is generally treated the same, whether it be by a displacement certification or by an application for termination. Both types of application are treated in the same way for the purposes of timetables established under the Act. That is illustrated by reference to the provisions of section 61, above. The termination of bargaining rights under section 57(1) and their displacement under section 5(2) are treated for the purposes of timing as parallel procedures, both of which are "subject to section 61". The Act plainly intends that sections 5(2) and 57(1) should operate on the same timetable, just as they did prior to the introduction of section 6(2). We can see no reason why the legislature would have intended to make the bargaining rights held by a newly certified union vulnerable at an earlier date under section 57(1) than under section 5(2). A change in the law of that magnitude would require clear and unequivocal language. The language of section 57(1) read together with the other provisions of the Act, including section 5(2), supports the conclusion that the bargaining rights of a union that has been certified and has not made a collective

agreement are not subject to attack for a minimum of one year from the date of the certificate issued by the Board.

23. For the foregoing reasons we conclude that in the instant case an application for a declaration terminating the bargaining rights of the respondent could not be brought until June 30, 1982, being one year after the issuing of the Board's certificate to the respondent union. The application is therefore dismissed.

DECISION OF BOARD MEMBER W. H. WIGHTMAN;

1. The decision raises two issues about which I wish to express my respectful concern.

2. Expedition in the final determination of the bargaining unit is vitally important in fairness to the individuals whose status is in question. As has been mentioned it is also vital to the successful conclusion of a first collective agreement and hence expedition serves the interest of harmonious industrial relations.

3. Thus it seems to me consistency with the public policy objectives of the legislation dictates a decision which will serve as an inducement to the parties, and indeed the O.L.R.B., to resolve questions of employee status as quickly as possible. Thus if I am unable to argue the law with my colleagues I do question the effects of the decision in terms of practical labour/management relations and its fairness both to employees whose status is in question and, in this case, to the applicant and those employees the applicant represented who might have been found to have comprised a majority of employees in the bargaining unit had the issue been put to a secret ballot vote.

4. To the extent this decision removes an incentive to resolve status questions, thus giving rise to the potential for more cases in which final determination of the bargaining unit and the possibility of concluding a collective agreement may be deferred as much as eighteen months (as in *York University supra*), I do not see public policy being well served.

5. As to the employees represented by the applicant it does not seem to me good enough to let a decision issue without noting there is a presumption he knew, or should have known he could have withdrawn the petition and re-submitted it in timely fashion. Since, as has been pointed out, "the issue raised is before the Board apparently for the first time", I presume neither the experienced counsel arguing for the respondent and intervener, let alone the applicant, could have anticipated the Board's decision. For this reason I would have thought natural justice dictates that we at least entertain the petition for purposes of assessing its voluntariness even at this date.

1994-79-U Dennis H. O'Keefe, Complainant, v. 410874 carrying on business as **Concrete Construction Supplies**, Concrete Supplies of Windsor Inc., M.B.L. International Contractors Inc., Concrete Construction Supplies Limited, Respondents, v. Teamsters, Chauffeurs, Warehousemen and Helpers Union Local 880, Intervener

Discharge for Union Activity – Practice and Procedure – Unfair Labour Practice – Discharged employee's grievance arbitration and unfair representation complaint unsuccessful – Unfair labour practice complaint filed after three year delay – Board refusing to inquire into complaint – Board not admitting documents filed after hearings closed

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members C. G. Bourne and M. J. Fenwick.

APPEARANCES: *John Pistor and Dennis O'Keefe for the complainant; Charles F. Clark for Concrete Supplies of Windsor Inc.; R. M. Parry and Henry Marentette for M.B.L. International Contractors Inc.; Ken Petryshen and Ray Doe for Teamsters, Local 880.*

DECISION OF THE BOARD; October 14, 1982

I

1. The style of cause in this matter is hereby amended to include as respondents the following firms: M.B.L. International Contractors Inc., Concrete Supplies of Windsor Inc., 410874 Ontario Limited carrying on business as Concrete Construction Supplies, and Concrete Construction Supplies Limited. This amendment is made solely for the purpose of identification of the potential parties herein and to permit their counsel to make representations. The amendment to the style of cause is without prejudice to the various submissions that these companies cannot be placed in jeopardy at this time, or at all, in respect of the complainant's unfair labour practice allegations. The Board also grants the request of Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local 880 to be added as an intervener for the purpose of making representations on certain ancillary relief sought by the complainant in this matter.

2. This is the complaint of Dennis H. O'Keefe who contends that he has been dealt with by his former employer contrary to section 58 [now section 66] of the *Labour Relations Act*. The material portions of section 66 read as follows:

No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;

• • •

- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

This is the latest in a series of applications which Mr. O'Keefe has filed. In order to explain the conclusion which we have reached, it will be necessary to review these earlier proceedings and the events preceding the hearing of the instant complaint.

3. Concrete Construction Supplies Limited, as its name suggests, was a ready-mix concrete supplier in the Windsor area. Mr. O'Keefe was employed as a driver in May of 1972. There is no dispute that his relationship with his employer was not always a happy one. He was discharged on March 17, 1977, allegedly for failing to wear prescribed safety equipment.

4. Mr. O'Keefe's termination resulted in a grievance alleging that he had been unjustly discharged and requesting that he be reinstated in employment with full seniority and compensation for lost wages. That grievance was not settled in the grievance procedure, and eventually came on for hearing before a board of arbitration chaired by his Honour Judge Gordon Stewart. The hearing consumed two days because of the union's preliminary objection to the composition of the arbitration panel. The decision of the arbitration board dismissing Mr. O'Keefe's grievance was announced on October 26, 1977, and its written reasons for that decision were issued on January 16, 1978. Those reasons include certain findings concerning the company's efforts to ensure that all of its employees wore safety hats, a finding that the grievor had been warned about that matter before (*inter alia*, by his shop steward), and a note that the grievor's evidence (which the board chose not to believe) was that none of the other employees wore safety hats. The board of arbitration decided not to modify Mr. O'Keefe's discharge or substitute some lesser penalty.

5. On October 31, 1978, Mr. O'Keefe filed a complaint with this Board (Board File 1280-78-U) alleging that he had been unfairly represented by Local 880 of the Teamsters' Union, which was then his bargaining agent, and had carried the grievance forward to arbitration on his behalf. The relief requested was that the *employer* reinstate the complainant in employment with full seniority and compensation for lost wages – that is, the same relief which had been requested of the arbitration board. On November 2, 1978, in accordance with its usual practice, the Board appointed a Labour Relations Officer to meet with the parties to endeavour to effect a settlement. At the same time the Registrar fixed November 21, 1978 as the date for the hearing should such settlement not be forthcoming. On November 20, 1978, the parties agreed to adjourn the complaint *sine die* for a period not exceeding one year, and on the condition that if it were not revived within that time the proceeding would be terminated. The unfair representation complaint against Teamsters' Local 880 was drafted for Mr. O'Keefe by a law student at

the University of Windsor, Legal Aid Clinic, who was acting on his behalf when the matter was adjourned.

6. The complaint was revived 6 months later by a letter from Mr. O'Keefe dated May 30, 1979. At this point it is unclear whether or not he was represented. The individual from Student Legal Aid subsequently advised the Board that it was no longer representing him. The Teamsters' Union filed a reply claiming that the Board should not hear the complaint by reason of the delay in proceeding with it, and demanding particulars of the allegations of misconduct. The employer intervened in the proceeding and took a similar position. The employer submitted that the discharge and already been considered by a board of arbitration, and further that, with the passage of time, there would be difficulty securing the presence of necessary witnesses and documentation.

7. The case came on for a hearing before the Board on July 26, 1979. The Board (differently constituted) decided that it would entertain the complaint, and that the question of delay could be considered in fashioning a remedy in the event the complainant was successful. The Board further determined that the lack of particularity might prevent an expansion of the allegations but would not bar the complaint altogether. However, on the basis of the evidence before it, and for the reasons more particularly set out in its decision dated August 23, 1979, (see, [1979] OLRB Rep. Aug. 739) the complaint was dismissed. The Board concluded in part:

It would appear that the respondent [trade union] did everything reasonable to represent the complainant's interest and there is nothing here which would suggest that it acted arbitrarily, discriminatorily, or in bad faith.

The complainant wrote a detailed request for reconsideration which was denied by a decision of the Board dated September 20, 1979.

8. On November 6, 1979, Mr. O'Keefe filed a new complaint against his trade union setting out further allegations concerning his discharge (Board File 1509-79-U). The Board (again differently constituted) reviewed the submissions in that complaint as well as the proceedings to date, and observed:

A comparison of the facts alleged by the Complainant in the instant application and the findings of fact made by the Board in its August decision clearly discloses that the Complainant is attempting to relitigate his earlier unsuccessful complaint before the Board. The Complainant is relying upon the acts or omissions of the Respondent which were the subject of an earlier Board proceeding and is requesting that the Board find that the Respondent contravened section 60 [now section 68].

The Board then went on to review its power of reconsideration under section 95(1) [now section 106(1)] of the Act as well as the application of a principle analogous to *res judicata* which had been applied in previous Board cases and affirmed by the Divisional Court, [See; *Radio Shack v. United Steelworkers of America*, 79 CLC ¶14,217.] By decision dated December 28, 1979, (unreported) the Board dismissed Mr. O'Keefe's new

complaint on the basis that he could not re-open and relitigate a matter which had already been settled by a decision of the Board which, by statute, is expressed to be "final and binding for all purposes". It is not disputed that this is what Mr. O'Keefe was trying to do. He hoped that the new complaint would provide a vehicle by which he could raise matters which he felt he had been unable to advance previously.

9. Throughout the period from his discharge to the dismissal of his second complaint (i.e. March 17, 1977 – Dec. 28, 1979) Mr. O'Keefe did not consult a solicitor, nor did he seek legal aid so that he could retain counsel. As mentioned above, his only assistance was a law student who helped him draft the first complaint in October, 1978 and who, it appears, played no role following the adjournment of the hearing in that matter.

10. The instant complaint (Board File 1994-79-U) was filed on January 25, 1980, a couple of weeks after Mr. O'Keefe received the Board decision dismissing his earlier (second) complaint. This time it is his former employer which is the named respondent. The allegation is that the *company* dealt with him over the period May 1, 1972 until March 17, 1977, (i.e., from the date of his employment to the date of his discharge,) contrary to section 58 [now section 66] of the Act. Essentially, the contention is that in its various dealings with Mr. O'Keefe in 1973, 1975 and 1976, the company exhibited an anti-union animus, and desire to penalize or discriminate against him because of his trade union activities. It is Mr. O'Keefe's submission that this is the "real reason" he was "singled out" and fired in 1977 for failing to wear a hard hat. That allegation, of course, is somewhat at odds with the arbitration board's factual findings concerning the company's efforts to maintain its safety policy and the finding that Mr. O'Keefe had been warned about the matter before and refused to comply. On the other hand, there is no indication that the anti-union element surfaced before the arbitration board and because the board chose not to believe Mr. O'Keefe, it is difficult to determine from its reasons how squarely his claim of discrimination was put to the board. The union takes no position in respect of this unfair labour practice complaint. The above-named respondents all oppose it for reasons which will be considered below.

11. The Board processed Mr. O'Keefe's new complaint as before. By a decision dated January 31, 1980, it authorized a Labour Relations Officer to meet with the parties to see if any settlement were possible and by notice dated February 1, 1980, the Registrar fixed February 27, 1980 as the date for a hearing should no such settlement be forthcoming. By letter dated February 14, 1980, counsel for Concrete Supplies of Windsor Inc. wrote to the Board to put on the record his client's protest that it was not a proper party to the complaint, that the allegations were untimely and ought not to be heard because of the delay involved, and to demand that the complaint supply full particulars of the material facts, actions, and omissions upon which he intended to rely. At the complainant's request the hearing was rescheduled to be held in Windsor on March 19, 1980. Once again, counsel for the respondent demanded particulars of the generalized allegations which, at that time, covered a period of some five years.

12. There followed a long period during which Mr. O'Keefe sought legal advice and legal aid. He consulted a number of solicitors and apparently had some difficulty finding one who was prepared to represent him. In August he notified the Board that he had retained a Mr. Rossi, who was to act on his behalf. But on October 8, 1980, the

Registrar of the Board was forced to write to Mr. O'Keefe to advise that it had heard nothing from his solicitor to that date. This elicited a response from Mr. Rossi requesting documentation and advising that particulars would be furnished to the respondent by the end of that month (i.e., October, 1980). It must be noted that there is no evidence to indicate whether Mr. Rossi had actually been retained before that date. In any event, particulars were forwarded to the Board on November 10, 1980, and in consultation with the parties, the Board scheduled a hearing to take place in Windsor on January 8, 1981. That hearing was adjourned at the request of counsel for the complainant who further wrote the Board on February 17, 1981 to request that the entire matter be adjourned *sine die*. It was his opinion that it might not be proceeded with any further, but that prior to confirming this result he would need a few more weeks to confirm certain information received. By decision dated February 20, 1981, the Board adjourned the complaint *sine die* for a period not exceeding one year. As before, the Board noted that unless within that time the parties requested that the Board proceed with the application, the proceeding would be terminated.

13. The Board heard from Mr. O'Keefe once again in late August, 1981 when, by letter, he requested that his case be put on for a hearing. On October 9, 1981, he requested that the complaint be amended to add two new parties: Concrete Supplies of Windsor Inc., and 410874 Ontario Limited. By this time it appears that Mr. O'Keefe was no longer represented by Mr. Rossi and had consulted his present counsel. The ambiguity was clarified by letter dated February 19, 1982 wherein his new solicitors requested that the complaint be reactivated and be amended to include relief against the various corporate respondents under section 1(4) of the Act. Under section 1(4) the Board is empowered in certain circumstances to treat several corporate entities as a single employer for the purposes of the Act. The complainant's purpose in relying on section 1(4) is to buttress his argument that if his former employer no longer exists he ought to be able to pursue certain allegedly related firms.

14. A hearing was fixed for March 25, 1982 in Windsor, Ontario, but by letter dated March 17, 1982, Mr. O'Keefe's counsel requested an adjournment of that hearing. The other parties consented. The case, rescheduled for May 27, 1982, eventually came on for a hearing before the present panel of the Board on September 14, 1982. At that hearing the Board decided that it would only entertain the parties' submissions on the preliminary objection that the matter should not proceed on its merits at all. The Board also heard the union's concerns about the application of section 1(4), and the complainant's oral and documentary evidence touching on the preliminary issue. Before turning to that evidence, however, it may be useful to briefly digress to explain the status of the various corporate respondents who appeared by separate counsel. As will become apparent, their corporate relationship is not only the basis for the complainant's request for the application of section 1(4), but also partly underpins the respondents' argument that it is simply too late for the complainant to "switch targets" and seek relief against them.

15. Mr. O'Keefe was employed by Concrete Construction Supplies of Windsor Limited ("CCSW Limited"). Sometime in 1978, CCSW Limited together with nine other companies was merged or amalgamated with M.B.L. International Contractors Inc. ("M.B.L."). The Marentette family apparently had interests in all of these various

businesses. Today, CCSW Limited exists, if at all, as part of the merged entity. In 1979, Concrete Construction Supplies of Windsor Inc. was adopted as the name and style under which a new numbered company, 410874 Ontario Limited would carry on business. It is not clear whether Concrete Construction Supplies of Windsor Inc. is a separate corporate entity from the numbered company or is merely another form of the style under which it operates. For the purpose of this decision it does not matter. M.B.L. owns twenty per cent of this business, and it is not disputed that the numbered company carries on a ready-mix concrete operation similar to that of CCSW Limited and, in the complainant's contention, from the same location.

16. The union points out that whatever the corporate realities after CCSW Limited was absorbed into M.B.L., it continues to have a "ready-mix" collective agreement with Concrete Supplies of Windsor Inc. and that M.B.L. is bound by a quite different "heavy construction" collective agreement through its membership in a local construction association. The union takes no position on the merits of the unfair labour practice complaint or whether the complainant should be able to follow the path of CCSW Limited into M.B.L. and perhaps to the numbered company and/or Concrete Supplies of Windsor Inc., in order to affix one or the other of these corporate entities with liability. The union is only concerned lest any relief under section 1(4) disturb its settled bargaining relationship with them. Regardless of the changes in corporate form, the parties, for collective bargaining purposes, have divided the business into its construction and ready-mix aspects, and have negotiated separate collective agreements to cover the employees in these parts of the business. The union is concerned that a direction that these various employers are one, might create problems for the application and administration of the two collective agreements which had previously bound the separate corporate "pieces" of the business - hence, the need to give those "pieces" status to make representations before the Board. In their submission these corporate changes merely underline the problems associated with delay, and support their argument that the Board should not inquire into the complaint at all.

17. Mr. O'Keefe's evidence was largely concerned with his attempts to get legal advice, financial assistance, and a solicitor who was prepared to represent him. We are not unsympathetic to his plight, but the fact remains that the primary thrust of his complaint is that he was discharged by his employer on March 17, 1977 because he was exercising rights protected by the Act and that complaint did not crystallize until almost three years later. In the meantime, of course, he went to arbitration and lost, then began vigorously pursuing his allegations against the trade union. Despite an antipathy to his former employer which he made no effort to conceal at the hearing before us, no unfair labour practice allegation was directed against it until almost three years after the discharge, and about seven years after the first allegation of misconduct (in 1973) upon which he now seeks to adduce evidence. There is no indication that the alleged anti-union considerations, which the complainant now says constitute the real reason for his discharge, were ever raised before Judge Stewart, and, as the Board has already noted, Judge Stewart does seem to have considered the consistency of the employer's efforts to ensure that *all* of its employees wore safety hats. In the circumstances, it is hardly surprising that the respondents' preliminary objection is that it is simply too late to pursue such matters and that pursuant to its discretion under section 89(4) of the Act, the Board should decline to inquire into the complaints. The respondents assert that the

complainant's tardiness irreparably prejudices their ability to marshal evidence in their defence, that it would be a denial of natural justice to proceed at this time, and that there are sound labour relations policy reasons for the Board refusing to do so.

18. Mr O'Keefe testified that this was *not* the first time that he had raised an unfair labour practice allegation against the company. He asserted that he had filed an unfair labour practice complaint against the company in the first instance, *before* launching his first complaint against his union (i.e. before October 1978). He told the Board that he had withdrawn that complaint after discussions with a Board-appointed Labour Relations Officer, whose name he could not recall, but who advised him that he should proceed first against his trade union, and only if unsuccessful should he turn his attention to his employer. Mr. O'Keefe testified unequivocally that he actually filed such unfair labour practice complaint, on the prescribed forms, and that when he decided to reformulate his complain as one against his trade union, he wrote to the Registrar of the Board indicating his intention and specifying that it was without prejudice to his right to proceed against his employer should he be unsuccessful.

19. A search and perusal of the Board's records, including all the files for all the proceedings commenced by Mr. O'Keefe, did not reveal any such unfair labour practice complaint against his employer, nor any such letter to the Registrar. There is no indication that any file was ever opened in the matter, nor that any Labour Relations Officer was ever appointed. That in itself is curious, if, as the complainant now says, a complaint was filed. The complainant did not tender any letter from the Registrar acknowledging receipt of his complaint or any of the usual follow-up material (similar to that which he received in his other cases) indicating that the complaint was being processed. A review of the Board's cross-referenced card index did not turn up any file number assigned to any complaint prior to Mr. O'Keefe's first complaint against his union (Board File No. 1280-78-U) on October 31, 1978. Mr. O'Keefe did not have a copy of the letter purportedly withdrawing his complaint, although he did have copies of other letters to the Registrar. Nor does the information which Mr. O'Keefe said he received from a Board Officer seem reasonable and probable, given an Officer's role.

20. It is possible that if a complaint were deficient the Board might have requested an Officer to seek clarification prior to processing it, and it is possible that Mr. O'Keefe might have been contacted by a Board Officer for this purpose. It is also possible that the Officer might have explained to him that if he had an unfair labour practice complaint against his employer he could proceed in that direction (bearing in mind the hurdle of the arbitrator's award), or if he were concerned about the quality of representation he had received, he could proceed against his trade union as he ultimately did. It is possible that the complainant got the impression that he could, without prejudice, proceed sequentially, although there is no evidence to indicate that he ever actually launched a proceeding against his employer or purported to reserve his right to do so. It is also possible that Mr. O'Keefe is confused as to the timing and content of these alleged conversations given that Officers were appointed in the unfair practice complaints against his union. At this stage, years later, it is difficult to make any concrete finding and the complainant's own recollection was hazy. One thing does seem to be clear – no complaint was processed prior to 1978. Whatever the complainant's understanding or intentions, the instant complaint against his former employer was not filed

until January 25, 1980, and it was not until October 9, 1981 that Mr. O'Keefe sought to add the respondents 410874 Ontario Limited and Concrete Supplies of Windsor Inc.

21. Following the hearing in this matter, counsel for the complainant wrote to the Board to advise that his client had undertaken a search of his files and had discovered several documents which he (Mr. O'Keefe) felt to be relevant. Those documents included a copy of letter to the Board dated April 5, 1977 (i.e., just after his discharge) requesting the forms to make a complaint against his employer under section 58 [now section 66] and two letters dated March 6, 1978 purporting to advise two union officials that he was filing such complaints. The letter to the union officials indicates that copies are to be sent to various company personnel. The complainant also discovered and tendered what purports to be an unfair labour practice complaint against Merentette Brothers Limited of a breach of section 58 [now section 66] of the Act which, however, is undated and unsigned.

22. There is no evidence before the Board that these letters or complaint had ever been received by anyone, nor is there any explanation why Mr. O'Keefe, with due diligence, could not have produced them at the hearing in this matter so that he could be examined regarding their contents. There was no mention in Mr. O'Keefe's oral evidence before the Board of any letter directly to his former employer or its officials concerning any unfair labour practice on its part, nor, for this reason, did they have an opportunity to respond to a factual assertion which might be relevant to the argument respecting delay. It would make nonsense of the hearing process if a witness were permitted, after the hearing, to bolster his evidence through the submission of documents not even adverted to in his testimony. It would also be unfair to the other parties. It is not as if the complainant did not have ample opportunity to prepare his submissions on delay. His complaint was filed in January, 1980 and did not come on for a hearing until mid-September, 1982. The complainant had more than 2 years to prepare and he was on notice that his delay in raising unfair labour practice allegations would be a matter for the Board's consideration. While there may be cases which warrant reopening a hearing because of assertions made after the fact, or the discovery of evidence which could not, with due diligence, have been produced earlier, this case is not one of them. The Board declines to reopen the hearing for the purpose of receiving or considering these documents. Perhaps Mr. O'Keefe simply forgot these communications made by him back in 1978. But it is precisely this difficulty of failing recollection which the respondents rely upon to support their preliminary objection. And as the Board has already indicated, whatever Mr. O'Keefe's intentions in 1977-78, he did not proceed against his employer until 1980; and his complaint spans the period 1972-77.

II

23. This is not the first time that the Board has had to address the problem of delay. In these troubled times the pattern of the instant case is repeating itself with increasing frequency. In more and more cases the Board is being asked to inquire into alleged breaches of the Act occurring years before, after the aggrieved employee has abandoned or unsuccessfully pursued his remedies in other forums. Indeed, in this case, the complainant has not only been unsuccessful before a board of arbitration, but he has already been unsuccessful in his earlier complaints before this Board. While these

complaints were framed against his union, the object, as in the present case, is to obtain a relitigation of the circumstances of his discharge in 1977. And even the allegation that Mr. O'Keefe was singled out and treated differently from other employees seems to have been dealt with, at least peripherally, by Judge Stewart in 1977.

24. Two recent cases will serve to illustrate the Board's approach to this problem. Both of them involved an exercise of the Board's discretion not to inquire into an alleged unfair labour practice complaint. That is the result which the respondents urge the Board in the instant case.

25. In *Sheller Globe*, [1982] OLRB Rep. Jan. 113, the complainant was discharged in March, 1979 and filed her complaint with this Board in October, 1981. In between, she had discussions with union and employer officials, she took legal advice, she filed a complaint with the Human Rights Commission, and in December 1980, she filed a wrongful dismissal action. Finally, two and a half years after the alleged offence, she complained to this Board that her union had not represented her adequately, and requested the Board to direct that the propriety of her discharge be submitted to a board of arbitration. The Board dismissed the complaint with the following observations:

13. A delay of the present magnitude carries with it an element of prejudice which is undeniable. Memories fade, and a party's ability to present a defence will deteriorate for that reason alone. This is particularly true when a party is not on notice that an action against it, requiring the litigation of certain events, remains pending. Here the respondent was justifiably under the impression that the grievance route, or any further demands against the union, had been abandoned in favour of other actions against the company. The lingering discussions which the complainant's husband had with Mr. Pattison and the stewards were clearly of an amicable nature; they provided no indication that action would subsequently be directed against the trade union itself, so that notes or other forms of evidence could be more actively maintained. The defence of the employer is *not* the defence of the trade union in these proceedings. The Board would be concerned not with the matter of cause for discharge, but rather the steps which the respondent's officials went through in concluding in their own minds that no grounds for a grievance existed. The defence would turn upon the recollections and credibility of the respondent's own officials. It might be noted parenthetically that the Labour Board, in administering the *Labour Relations Act*, is primarily concerned with the ongoing labour relations of a workplace, and such workplaces do not remain static over time. The Board as a result has always been conscious of the need for expedition in its practices and procedures. The delay in the present case raises concerns over an appropriate remedy, if the Board were to permit this complaint to now proceed, which are not fully answered by the complainant's concession as to damages. In the circumstances such as the present, the onus shifts to a complainant to satisfy the Board that there are compelling labour relations

reasons to cause the Board to exercise its discretion and entertain the complaint under section 89.

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15. In the present case, the delay has indeed been “extreme”, and the factors put forward by the complainant are insufficient to deliver her from the consequences of that delay. Certainly the Board has no quarrel with the notion of an aggrieved individual investigating other avenues of redress prior to launching a section 68 application with the Board. But a point is reached, after a reasonable period of time, when the individual must decide whether it is going to go against the trade union or not, and if so, then overt steps must be taken in that direction. The individual cannot rely indefinitely on the efforts being taken on his or her behalf in other directions, and then come back against the trade union when those efforts prove fruitless. The important point to note here is that the other forms of action being pursued by the complainant were directed solely against the employer. Not a word was said to the trade union during that period to indicate that its conduct was being viewed as unlawful, or that its own position might still be placed in jeopardy. The complainant will not now be permitted, at this late date, to use section 68 against the trade union as a last resort to reach the employer.

26. In *Corporation of the City of Mississauga*, [1982] OLRB Rep. March 420, the Board also had before it a complaint against a trade union arising initially from an employer’s decision to discharge one of his employees. The complainant in that case had been terminated in 1976. His reinstatement had been arranged on terms apparently satisfactory at the time; but five years later, after an unsuccessful reference to the Ontario Human Rights Commission, he brought an unfair labour practice complaint against his union. The Board commented on the issue of delay as follows:

20. It is by now almost a truism that time is of the essence in labour relations matters. It is universally recognized that the speedy resolution of outstanding disputes is of real importance in maintaining an amicable labour – management relationship. In this context, it is difficult to accept that the Legislature ever envisaged that an unfair labour practice, once crystallized, could exist indefinitely in a state of suspended animation and be revived to become a basis for litigation years later. A collective bargaining relationship is an ongoing one, and all of the parties to it – including the employees – are entitled to expect that claims which are not asserted within a reasonable time, or involve matters which have, to all outward appearances, been satisfactorily settled, will not reemerge later. That expectation is a reasonable one from both a common sense and industrial relations perspective. It is precisely this concern which prompts parties to negotiate time limits for the filing of grievances

(as the union and the employer in this case have done) and arbitrators to construct a principle analogous to the doctrine of laches to prevent prosecution of untimely claims. (See *Re C.G.E.* 3 L.A.C. 980 (Laskin); and *Re Oil Chemical & Atomic Workers, Local 9-672 and Dow Chemical of Canada Limited* [1966] 18 L.A.C. 51 (Arthurs)).

21. In recognition of the fact that it is dealing with statutory rights, the Board has not, heretofore, adopted any rigid practice with respect to the matter of delay – holding, in most cases, that it will simply take this matter into account in determining the remedy if a statutory violation is established. However, whatever the merits of this approach, the Board must also keep in mind the potentially corrosive effect which litigation can have upon the parties' current collective bargaining relationship – quite apart from the outcome. Adversarial relationships are pervasive enough in our industrial relations system without the resurrection of ghosts from the past. In the Board's view, the orderly conduct of an ongoing collective bargaining relationship and the necessity of according a respondent a fair hearing both require that unions, employers and employees recognize a principle of repose with respect to claims that have not been asserted in a timely fashion. If such claims are not launched within a reasonable time, the Board may exercise its discretion pursuant to section 89 and decline to entertain them.

22. A perusal of the Board cases reveals that there has not been a mechanical response to the problems arising from delay. In each case, the Board has considered such factors as: the length of the delay and the reasons for it; when the complainant first became aware of the alleged statutory violation; the nature of the remedy claimed and whether it involves retrospective financial liability or could impact upon the pattern of relationships which has developed since the alleged contravention; and whether the claim is of such nature that fading recollection, the unavailability of witnesses, the deterioration of evidence, or the disposal of records, would hamper a fair hearing of the issues in dispute. Moreover, the Board has recognized that some latitude must be given to parties who are unaware of their statutory rights or, who, through inexperience take some time to properly focus their concerns and file a complaint. But there must be some limit, and in my view unless the circumstances are exceptional or there are overriding public policy considerations, that limit should be measured in months rather than years.

27. The *Labour Relations Act* provides a comprehensive code wherein volatile industrial disputes can be resolved quickly, and usually without great expense. Access to this Board is relatively easy. There are none of the procedural or financial impediments applicable to a proceeding in the Courts. There are no express limitation periods. There is no risk of costs. There is no requirement to retain a solicitor. There is little by way of formal pleading. There is no pre-trial discovery. The rules of evidence

are substantially relaxed. And as has been indicated by the course of the earlier proceedings, the Board will normally respond to an unfair labour practice complaint within a few days, and will typically schedule a hearing within three or four weeks of the date upon which the complaint is filed. Informality and expedition are the norm. Against this background, it is difficult to reconcile accepting a complaint filed several years after the precipitating event (i.e. the discharge) encompassing allegations going back years before that.

28. A collective bargaining relationship is both delicate and dynamic. There is a real need to resolve disputes finally and expeditiously. Prompt adjustment of unfair labour practice complaints is of considerable importance in maintaining an orderly collective bargaining process. In general, parties should not have to face the resurrection and litigation (in this case relitigation) of these "ghosts from the past" which surface unexpectedly to plague the parties' current relationship. There must be some limits; and, as the Board indicated in *Corporation of the City of Mississauga, supra*, unless the circumstances are exceptional or there are overriding public policy considerations, that limit should ordinarily be measured in months rather than years. If a complainant does not assert his claim within a reasonable period of time, he will face the possibility that the Board may decline to entertain it. In this respect the Board's approach is akin to the common law doctrine of laches. Nor does it avail the complainant to argue, as he now does, that he was pursuing his remedies in another forum (arbitration) or against other parties (his trade union and its officials). A point is reached, after a reasonable period of time, when the individual must decide whether he is going to proceed against a particular respondent and, if so, then to take concrete steps in that direction. The complexity of labour relations remedies is an unfortunate fact of life; but this does not mean that the Board must become the forum of last resort for individuals who have pursued their remedies elsewhere, unsuccessfully, and seek to reformulate their complaint so as to bring it within the Board's jurisdiction. Labour relations policy considerations dictate not only that a complaint should be resolved expeditiously, but also that it should be brought without undue delay.

29. In the present case the delay has been extreme. Mr. O'Keefe waited almost three years (until January 1980) after his discharge before prosecuting his complaint against his former employer and, as already noted, some of the particulars of alleged misconduct, go back to 1973. In the meantime, an arbitration board has determined that his employer had just cause for his discharge, and the Board has affirmed that his trade union represented the complainant properly and did what it could for him. It took Mr. O'Keefe a year before he formulated his complaint against his union and more than two years until that complaint was resolved. It is only after that that Mr. O'Keefe decided to "switch targets" back to the employer. Until 1980, there was no allegation of a breach of the Act levelled against the employer. Until 1980, the situation was as Judge Stewart found it to be: that the complainant had been discharged for failing to adhere to the company's well-established rules about wearing safety equipment. Throughout this period the company was on the sidelines and not directly in jeopardy.

30. We must determine whether at this date we should inquire into the events in the years preceding the complainant's termination to determine whether in 1977 he was dealt with contrary to the Act having regard, *inter alia*, to Judge Stewart's finding that all employees were required to wear safety hats, the complainant persistently refused to

do so, and he was properly discharged for that reason. If after our enquiry, a breach of the *Labour Relations Act* could be sustained, the Board would then face the difficult task of trying to fashion a remedy against one or more of the respondents having regard, *inter alia*, to the passage of time, and the altered corporate and commercial context. We decline to do so. In our view, the circumstances overwhelmingly dictate that there should be no further litigation arising out of Mr. O'Keefe's discharge in 1977. These proceedings must be brought to an end.

31. The Board is not satisfied with the complainant's explanation for the delay in bringing this complaint and, in our view, there are no special public policy reasons for enquiring into it. Indeed, all of the policy and practical considerations arising from the facts of this case suggest a contrary conclusion. Accordingly, pursuant to its discretion under section 89(4) of the Act, the Board declines, at this time, to enquire into Mr. O'Keefe's allegations.

32. The complaint is therefore dismissed.

0053-82-R; 0418-82-U International Brotherhood of Electrical Workers Local Union 1687, Applicant, v. **Crowle Electrical Limited** c.o.b. as Crown Electric, Respondent, v. Christian Labour Association of Canada, Intervener, v. Group of Employees, Objectors

Certification Where Act Contravened – Change in Working Conditions – Discharge for Union Activity – Interference in Trade Unions – Practice and Procedure – Remedies – Unfair Labour Practice – Displacement application triggering statutory freeze period – Employer continuing negotiations and entering into collective agreement with incumbent union – Bargaining duty prevailing over freeze – Employee lay-offs unlawful – Board policy not to certify without vote in displacement situations – Applicant given choice between results of vote held or new vote as part of remedial order – Usual rule for eligibility to vote modified in unique circumstances

BEFORE: Kevin M. Burkett, Alternate Chairman and Board Members W. H. Wightman and S. Cooke.

APPEARANCES: Jeffery Egner, Lou Popovich and Ralph Tersigni for the applicant/complainant; James Kelleher and Richard Crowle for the respondent; Owen V. Gray, John Adema and Ron Rupke for the intervener.

DECISION OF THE BOARD; October 25, 1982

1. The Board directs that the above application and complaint be and the same are hereby consolidated.

2. This is an application for certification in which the applicant union seeks to displace an incumbent. In addition the Board has before it a complaint under section 89 relating to the conduct of the employer in connection with this application for

certification and an application under section 8 of the Act that the Board certify without a vote.

3. In a decision dated May 17, 1982, the Board found the applicant to be a trade union within the meaning of section 1(1)(p) of the Act, and, as is the Board's practice in displacement applications, exercised its discretion under section 7(2) of the Act to set a voting constituency and direct the taking of a representation vote. Those eligible to vote were described as "all employees of the respondent in the voting constituency on the 14th day of May, 1982, who have not voluntarily terminated their employment or who have not been discharged for cause between the 14th day of May, 1982 and the date the vote is taken." The vote was taken on May 31, 1982.

4. Having regard to the effect of section 144 of the Act, the Board determined in its decision of May 17, 1982 that the voting constituency should be as follows:

"all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all electricians and electricians' apprentices in all other sectors in that portion of the District of Algoma south of the 49th parallel of latitude, save and except non-working foremen and persons above the rank of non-working foreman."

We hereby find the above described voting constituency to constitute the unit of employees appropriate for collective bargaining in this matter.

5. When the vote was conducted on May 31, 1982, twenty persons appeared to cast ballots. Challenges were made in respect of eleven of these persons and their ballots were segregated pending a resolution of the challenges. The incumbent union challenged the eligibility of nine of those who appeared to vote on the grounds that they were not at work on May 14, 1982 and, therefore, did not satisfy the requirements laid down by the Board in its decision of May 17, 1982. The unfair labour practice complaint which has been filed by the applicant is in respect of two of those whose eligibility to vote has been challenged on the basis of their failure to be at work on May 14, 1982. If the complaint is successful, in so far as it relates to the layoff of these two employees (Lynn Jarratt and Randy Cadell) and if they are employees within the bargaining unit, they will satisfy the eligibility requirements. The applicant has challenged the eligibility of Mr. Ron Crowle, whose brothers are part owners and manage the company, as not being at work on May 14, 1982 or within the bargaining unit. The applicant also challenged the status of Mr. Martin Morin, as not being at work on May 14, 1982 or alternatively, if at work, not performing the work of an electrician apprentice.

6. With the exception of Mr. Jarratt, all of the challenges to voter eligibility can be disposed of independently of the unfair labour practice complaints. Notwithstanding the intervener's claim that Mr. Jarratt was not an apprentice at the time of the application we are satisfied on the evidence that for purposes of, and at the time of this application, he worked as an apprentice electrician within the bargaining unit. His eligibility to vote, therefore, is contingent upon the success of the applicant union's complaint arising out of his layoff on May 7, 1982. If the applicant is successful in its

complaint, the Board, in the exercise of its remedial authority, will order the reinstatement of Mr. Jarratt effective from May 7, 1982 and, therefore, for purposes of this application, he will be considered as having been at work from that date. Mr. Cadell, in respect of whose layoff the union also claims a violation of the Act, would be in a like position except that the evidence discloses that at the relevant times Mr. Cadell was not an apprentice within the bargaining unit but a helper. Even if reinstated, therefore, Mr. Cadell does not fall within the bargaining unit.

7. Turning to the seven remaining employees whose eligibility to vote has been challenged by the intervener trade union on the ground that they were not at work on May 14, 1982, the qualifying day stipulated by the Board in its decision of May 17, 1982. All of the employees worked for the company in Elliot Lake. The evidence discloses that the company and the incumbent union had agreed to a four day work week at its Elliot Lake project; four 10 hour days Monday to Thursday inclusive, with Fridays off. However, if in any week a total of 40 hours had not been worked by Thursday, the agreement required that the shortfall in hours be made up on the Friday. During the work week ending Friday May 14, 1982 the bargaining unit employees had not worked 40 hours by the completion of the work day on Thursday May 13th. A wildcat strike by the employees of another contractor had resulted in a shut down of the project on Wednesday, May 12, 1982. In these circumstances the parties who appeared before the Board on May 14, 1982 expected work to be scheduled on Friday, May 14, 1982. However, unbeknownst to Mr. Rick Crowle, the manager of the company's Elliot Lake operations who was in attendance at the hearing in Toronto on May 14, 1982, his foreman had taken it upon himself not to schedule work on that day. The evidence is that the foreman told the bargaining unit employees that he was not scheduling work because he had a dentist's appointment. In any event, work was not scheduled and none of the bargaining unit employees working at the company's Elliot Lake project worked on May 14, 1982.

8. The intervener trade union asks the Board to adopt its standard construction industry approach and restrict those eligible to vote to those at work on the day stipulated by the Board. Because of the transiency of the work place in the construction industry, and because of the potential for mischief in the establishing of voter lists, the Board has been required to develop and apply rules related to fixed dates both for the purpose of assessing membership strength at the date of application and for the purpose of determining support among employees in a representation vote taken at a later date. (See *Re London District Children's Treatment Centre* [1980] OLRB Rep. April 461 *P & R Concrete Finishing* [1978] OLRB Rep. Oct. 944 and *Diplock Durable Floor Company Limited*, [1982] OLRB Rep. Aug. 1159.

9. If the Board had been advised at the hearing on May 14, 1982 that no work had been scheduled on that day, it would not have stipulated in its decision that only employees in the voting constituency on May 14, 1982 would be eligible to vote. Indeed, it can safely be presumed that if the employer had been aware that its foreman had instructed its work force not to report he would have advised the Board so that another date could have been fixed. The overriding objective of the certification process is to test and act upon employee sentiment with respect to the choice of a bargaining agent. This case is distinguishable from those in which the Board establishes a qualifying day and an employee(s), for whatever reason, disenfranchises himself by

failing to attend at work. In this case there was no work to attend at on the qualifying day with the result that it is argued that the employer's total Elliot Lake work force should be disenfranchised. Given the overriding objective of the certification process the the reason for the failure to attend at work on May 14, 1982, and the misconception under which the Board set that day as the qualifying day, we are of the view that the Board should exercise its authority under section 106(1) of the Act and reconsider the decision of the Board dated May 17, 1982 and in particular the stipulation contained in that decision that only employees of the respondent in the voting constituency on May 14, 1982 be eligible to vote.

10. We have determined that the fairest and most expeditious way to resolve the anomolous result flowing from the requirement laid down by the Board in its May 17th decision that employees of the respondent must be in the voting constituency on May 14, 1982 in order to be eligible to vote is to give a braoder meaning to the phrase "in the voting constituency" thasn is usually the case. Where the Board requires that employees in the construction industry be in a voting constituency on a stipulated day in order to be eligible to vote, these employees must be physically at work within the scope of the craft jurisdiction on the day in question. However, in the unique circumstances of this case we have decided that for purposes of determining voter eligibility the term "in the voting constituency", as it appears at paragraph 11 of the Board's May 17th, 1982 decision, should be read to include all those who were either at work within the craft jurisdiction on May 14, 1982 or who would have been scheduled to work within the craft jurisdiction on May 14, 1982 had it not been for the decision of the foreman on May 13, 1982 not to schedule work for that day. In the result all of those whose eligibility to vote has been challenged by reason of not being within the voting constituency on May 14, 1982 are eligible to vote and we so find.

11. Mr. Morin, who was laid off along with three other bargaining unit employees on May 7, 1982 was recalled to work on Friday May 14, 1982. Although the timing of his recall relative to the date of the Board hearing on May 14, 1982 gives rise to a natural suspicion, we are unable to find on the evidence that his recall, in preference to the other employees who were laid-off at the same time, was effected with the upcoming vote in mind or was designed to in any way influence the ultimate choice of a bargaining agent. The uncontradicted evidence of Mr. Crowle is that his working foreman, who is a member of the bargaining unit, told him that an additional apprentice was required and that he, in turn, decided to recall the one who lived in Elliott Lake and would not have to be paid room and board allowance. Although Mr. Jarratt had an earlier start date with the company, Mr. Morin had more hours of work with the company than Mr. Jarratt. The recall of Mr. Morin did not violate the collective agreement between the intervener trade union and the respondent company. Mr. Morin was scheduled to work on May 14, 1982 and would have worked within the scope of the craft jurisdiction had it not been for the decision of the foreman on May 13, 1982 not to schedule work for that day. Mr. Morin therefore, was within the voting constituency as we have now defined it on the day in question and is, therefore entitled to vote.

12. The remaining person whose eligibility to vote has been challenged is Mr. Ron Crowle. During the work week ending May 14, 1982, Mr. Ron Crowle, a journeyman electrician, was installing wiring in a hardware store which his father was building. He was paid as an employee of the respondent at the time. The respondent's

construction business is carried on separate and apart from the hardware business and, at the relevant time, Mr. R. Crowle was performing the work of a journeyman for the respondent electrical contractor within the geographic scope of the bargaining unit. Notwithstanding the fact that his father is a part owner of both the hardware business and the electrical contracting business, we are satisfied on the evidence that he was within the voting constituency at the relevant time and is, therefore, eligible to vote.

13. Turning to the layoffs. The company operates in Sault Ste. Marie and in Elliot Lake. Both locations are within the geographic scope of the bargaining unit. Three students who had been working for the respondent in Elliot Lake returned to school on April 26th and were not replaced. However, the layoffs which the applicant union claims were motivated by anti-union considerations took place in Elliot Lake commencing with the layoff of Mr. R. Atherton on March 25th. Mr. Atherton was advised by Mr. Adrien Patoline, his foreman, on March 23, 1982 that effective March 25, 1982 he would be laid off. Mr. Atherton was hired by Crowle to work as an electrician's apprentice in Sault Ste. Marie on January 18, 1982. Mr. Atherton testified that when he was interviewed by Mr. Crowle he was asked what he thought about the union and was told by Mr. Crowle that he had been involved with the union for 10 years, had gotten out of it, and would like to stay that way. Although Mr. Crowle did not refer to the applicant by name, Mr. Atherton understood that he was referring to the International Brotherhood of Electrical Workers (IBEW). Mr. Crowle testified that he could not remember asking Mr. Atherton anything about the IBEW at the time. Mr. Atherton testified further that when given notice of his layoff he was told by Mr. Patoline that he had been talking to Mr. Crowle who had said that he was being laid off because of the union business and that he would not be the last one to leave. Mr. Atherton, who had applied to join the applicant union on March 1, 1982, testified that he made no attempt to conceal his support for the applicant union. Mr. Lynn Jarratt, a fellow apprentice who was laid off on May 7th, testified that after the layoff of Mr. Atherton, Mr. Patoline told him that when he informed Mr. Crowle that he had told Mr. Atherton "exactly what you said" Mr. Crowle then instructed him to tell Mr. Atherton that he was laid off, not because of union activity, but because of a shortage of work. Mr. Lynn Jarratt testified that when he asked Mr. Patoline about the layoff of Mr. Atherton he was told by Mr. Patoline that Mr. Crowle had said that Mr. Atherton was to be laid off because of the "union B.S." Mr. Jarratt also testified that Mr. Patoline had told him that Mr. Crowle said that he was going to "clear the shop". Mr. Patoline, who is a working foreman within the bargaining unit, was not called to testify. Mr. Crowle denied that he had ever told Mr. Patoline that Mr. Atherton was to be laid off because he was a union supporter. The hearsay evidence of Messrs. Atherton and Jarratt with respect to what Mr. Patoline told them Mr. Crowle had said was heard subject to a ruling as to whether or not it should be given any weight.

14. Mr. Atherton admitted in cross-examination that he knew that he would be laid off for lack of work but maintained that he did not think it would happen as soon as it did. He acknowledged that at the time he was laid off he was at the bottom of the seniority list.

15. Messrs. Lynn Jarratt, Randy Cadell and Ken Bishop, all working at Elliot Lake, were laid off by the company effective from May 7, 1982. All three had signed membership cards in the applicant trade union. Mr. Lynn Jarratt was the only one of

these employees to appear to testify at the hearing in this matter. He was hired as an apprentice to work out of Sault Ste. Marie on September 14, 1981 and was subsequently transferred to Elliot Lake. It is his evidence that he approached Mr. R. Crowle on March 23, 1982, the day Mr. Atherton was given notice of his layoff, asked about his job security and was told by Mr. Crowle that he had nothing to worry about. In early April he filed a grievance under the subsisting collective agreement claiming payment for travel allowance from September 14, 1981 to March 1, 1982; the time during which he worked at Sault Ste. Marie. The grievance was presented to Mr. Crowle by his brother John Jarratt who was a steward with the intervener trade union at the time. John Jarratt testified that when Mr. Crowle was presented with the grievance he replied "wait until my brother and the old man hear about this, he'll lose his job over this." Mr. Crowle denied that he said that Mr. Jarratt's job was on the line because of the grievance he had filed.

16. Mr. Crowle was called to testify in defence of the allegations that the layoffs in Elliot Lake were in response to union activity. Mr. Crowle testified that the layoffs were necessitated by a marked decline in the volume of work undertaken by the company in Sault Ste. Marie, combined with the inability of the company to secure additional work in Elliot Lake. Mrs. Barbara Crowle, the wife of Mr. Jack Crowle, a part owner and manager of the Sault Ste. Marie operation, testified. She acts as secretary/treasurer of the company. A number of documents relating to the volume of business and to the movement of employees were put into evidence through her. This evidence, which was uncontradicted by the union, establishes the marked decline in the volume of the company's business in Sault Ste. Marie and its failure to secure new contracts in Elliot Lake. In 1981, the company had 12 contracts worth over one million dollars for work at the Algoma Steel plant. In contrast, the company has had only one job at the Algoma plant in 1982. In describing the effect of these adverse business developments, Mr. Rick Crowle explained that the company's employees in the Sault Ste Marie had greater seniority than its employees in Elliot Lake so that when the work in the Sault fell off the employees who were working there were transferred to Elliot Lake thereby necessitating the layoffs of the more junior Elliot Lake employees. Historically, employees of the company about to be laid off in the Sault have bumped less senior employees in Elliot Lake. The evidence tendered by Mrs. Crowle establishes that, other than Mr. Aitken, who transferred from the Sault to Elliot Lake for a few days on or about April 16, 1982, none of the Sault employees transferred to Elliot Lake until May 14, 1982. With the exception of Mr. Morin, the Elliot Lake apprentice who was laid off on May 7, 1982 and recalled on May 14, 1982, none of those who were laid off have been recalled and, other than for the more senior employees who were transferred to Elliot Lake, no one has been hired to replace the laid off employees. The laid off employees all had less seniority than the employees who transferred from the Sault. Mr. Crowle testified that Mr. Patoine convinced him to recall an apprentice and that the decision was taken to recall Mr. Morin, who had less seniority than Mr. Jarratt, because he was a local and would not be entitled to room and board as Mr. Jarratt would. Mr. Crowle maintained that the recall of Mr. Morin, in preference to Mr. Jarratt, did not violate the collective agreement and he pointed out that Mr. Morin had additional hours of work to his credit.

17. The evidence of Mr. Crowle, which is uncontradicted on the point, is that Randy Cadell, although scheduled to work in the two week period prior to his layoff on

May 7, 1982, did not appear at work during this period. It is Mr. Crowle's understanding that he did not intend to continue with the respondent and returned to his father's business as a bricklayer. Although Mr. Cadell was officially laidoff on May 7th along with the others, Mr. Crowle understood that he had already voluntarily terminated his employment. Mr. Caddell did not appear to testify.

18. Turning to the negotiations which took place between the respondent company and the intervener trade union for a renewal collective agreement. The intervener served notice of its intention to bargain for a renewal agreement on March 29, 1982; more than two weeks before the respondent company received notice of the application for certification in this matter. A first meeting was held on April 8, 1982; one week before the respondent company received notice of this application. Their respective positions were explored at this first meeting and a second meeting took place on April 30, 1982; some two weeks after notice of this application has been received. A memorandum of settlement was entered into at this time providing for a substantial increase in wages and benefits. The evidence is that the respondent and the intervener had historically reached agreement after one or two meetings in a bargaining relationship extending back to 1972. Mr. Crowle testified that it was especially important that an agreement be reached because the company was bidding on two large jobs in Elliot Lake worth over half a million dollars, which were closing on May 1. The labour content of these jobs was about 90%.

19. Negotiations for a province-wide collective agreement covering the employees represented by the affiliated bargaining agents of the International Brotherhood of Electrical Workers (BEW) were progressing concurrently with the negotiations between the incumbent union and the respondent company in this matter. A memorandum of agreement in respect of these province-wide negotiations was reached on May 5, 1982 and was subsequently ratified. Under section 147 of the Act, it is this agreement which will cover the employees of the respondent who are the subject matter of this application if the applicant union is successful. Mr. Crowle testified that he was unaware of the bargaining positions which were being taken in the IBEW province-wide negotiations when he concluded the renewal agreement with the intervener trade union. The evidence is that these negotiations were conducted in secret. The differential between the rates paid under the predecessor IBEW province-wide agreement and those paid under the predecessor agreement between Crowle and the intervener was \$1.68 per hour in favour of the IBEW rate. Under the renewal agreements the differential increases by 15¢ in the first year but is reduced to 33¢ by the end of the agreement.

20. The applicant, relying on the comments made by Mr. Crowle to Messrs. Atherton and Jarratt when they commenced employment with Crowle, the statements made by Mr. Patoine to Messrs. Atherton and Jarratt with respect to what he had been told by Mr. Crowle concerning the layoff of Mr. Atherton (which the applicant characterizes as admissions against interest and, therefore, exceptions to the hearsay rule) the decision of the company to recall Mr. Morin in preference to Mr. Jarratt, the timing of the layoffs relative to its organizing and the date set for voter eligibility, and the implausible explanation put forward by the company for the layoffs, asks the Board to find that the layoffs, which are the subject matter of this complaint, were motivated by anti-union considerations. The applicant argues that the reliance of the respondent on the downturn in its business in Sault Ste. Marie and the transfer of senior employees

from the Sault to replace junior employees in Elliot Lake should not be accepted by the Board because the employees in Elliot Lake were laid off in advance of employees being transferred from the Sault; seven weeks in the case of Mr. Atherton and one week in the case of the others.

21. The applicant argues that in addition to violating sections 64 and 66 of the Act in laying off the union supporters which it did, the company also violated section 79(2) of the Act when it implemented the improved wages and terms and conditions of employment after receipt of notice of this application. The applicant also maintains that these negotiations were carried out with the view to making it appear that a significant improvement in terms and conditions of employment had been effected by the incumbent union and, therefore, the applicant argues that these negotiations also constitute an unlawful interference with its attempt to organize the respondent's employees. In this regard the applicant asks the Board to pay special attention to the narrowing of the differential between IBEW rates under the provincial agreement and the rates provided under the agreement between the respondent company and intervener trade union. The applicant takes the position that in the face of the respondent's violations of the Act the Board should conclude that the true wishes of employees are not likely to be ascertained and certify it without a vote. Alternatively, the applicant union argues that even if this is not a case which requires the application of section 8, it has demonstrated membership support in excess of fifty-five per cent and, therefore, the Board should exercise its discretion under section 7(2) of the Act and certify without a vote.

22. The respondent and the intervener union adopted essentially identical submissions. They ask the Board to accept the evidence of Mr. Crowle that he did not know that the laid off employees were union supporters and to find, therefore, that he could not have laid them off for anti-union reasons. They maintain that the explanation for the layoffs put forward by Mr. Crowle, when considered in the context of the construction industry where, as in this case, there may not be a need to immediately replace a laid off employee in order to maintain production, is a credible one which should be accepted by the Board. They argue that in the absence of specific statutory language to the contrary, as appears in section 63(9) of the Act, the duty to bargain with the trade union holding bargaining rights continues in the face of a displacement application for certification. They maintain that section 79(2) does not deal with a displacement situation and should not be stretched to undermine the duty to bargain. Where, as in this case, the bargaining followed the pattern which it has followed over a long period, the parties to the bargaining were not aware of the positions being taken in the IBEW province-wide bargaining and the differential between IBEW rates and the rates under the renewal agreement with the intervener increases in the first year, they argue that it cannot be found that the bargaining was used to unlawfully interfere with the applicant's organizing campaign. They point out as well that because the IBEW province-wide bargaining was going on at the same time a failure of the incumbent to bargain its own agreement would have made it appear impotent.

23. Finally, they argue that even if there has been a breach of the Act in this case, which they maintain there has not been, it is not a breach that requires the application of section 8 of the Act. In response to the applicant's submission that the Board exercise its discretion under section 7(2) and certify without a vote, the respondent and the intervener argue that there is nothing before the Board to cause it to treat this

displacement application differently than the many others which it processes and that, in any event, the Board exercised its discretion under section 7(2) when, in its decision of May 17, 1982, it directed the taking of a representation vote. In the absence of collusion between the respondent and the intervener they ask that the Board not reconsider its decision of May 17 and to count the ballots cast on May 31.

24. This complaint is filed under section 89 of the Act and, insofar as it is alleged that the layoffs are in breach of the Act, section 89(5) applies. Section 89(5) provides:

On an inquiry by the Board into a complaint under subsection (4) that a person has been refused employment, discharged, discriminated against, threatened, coerced, intimidated or otherwise dealt with contrary to this Act as to his employment, opportunity for employment or conditions of employment, the burden of proof that any employer or employers' organization did not act contrary to this Act lies upon the employer or employers' organization.

25. The substantive provisions of the Act which the complaint alleges have been breached are:

64. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of his freedom to express his views so long as he does not use coercion, intimidation, threats, promises or undue influence.

66. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

(a) shall refuse to employ or continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;

79(2) Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until,

(a) the trade union has given notice under section 14, in which case subsection (1) applies; or

(b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union.

26. It is now well established that in section 89 complaints where it is alleged that the employer has refused to continue to employ a person because that person was or is a member of a trade union or was or is exercising any right under the Act, the employer must establish that the reasons given for the refusal to continue to employ are the only reasons and that those reasons are not in any way tainted by anti-union motive. (See *Re Winchester Press Limited*, [1982] OLRB Rep. Feb. 284 and the cases cited therein.) It is unlikely that an employer will deliberately incriminate himself in a section 89 proceeding of this type and accordingly, in deciding whether or not the employer has satisfied the onus of establishing that he acted without anti-union motive, the Board must consider not only the direct evidence but the circumstantial evidence as well. The Board must take into account the employer's knowledge or lack of knowledge of trade union activity, the timing of this alleged unlawful actions vis-a-vis union organizing or the exercise of other rights under the Act and the credibility of the explanation put forward in light of the objective facts, and draw the inferences which are supported by all of the evidence.

27. The Board allowed evidence to be adduced by two bargaining units employees of conversations between Mr. Patoine, the working foreman, and themselves, in which Mr. Patoine recounted to them admissions which Mr. Patoine said were made by Mr. Crowle with respect to the reasons for the layoff of Mr. Atherton. The applicant argues that this evidence should be admitted by the Board under the admission against interest exception to the hearsay rule. We have decided that their evidence of what Mr. Patoine told them Mr. Crowle said should not be given any weight. The difficulty in this case stems from the ambiguous role of a working foreman in the construction industry. A working foreman, as was Mr. Atoine, performs certain supervisory functions and may act as a conduit between management and the crew which he supervises, but at all times remains in the bargaining unit entitled to work with the tools of his trade and be compensated under the terms of the collective agreement. In this case, therefore, there is no clear separation of interest between the agent making the admission and the complainant who seeks to rely upon it. Where the person making the admission upon which the complainant seeks to rely is closely aligned in interest with the complainant, it would be grossly unfair to the respondent to apply the admission against interest exception to the hearsay rule. If the complainant wanted the alleged admissions of Mr. Crowle put in evidence it should have called Mr. Patoine, a member of its bargaining unit, who could then have been cross-examined by the respondent.

28. The evidence before us establishes the existence of a severe business slow-down in Sault Ste. Marie which had a serious negative impact on the level of the company's operations there. The evidence further establishes that the company has been unable to secure any work in Elliot Lake beyond that which was in progress at the time of the layoffs. Finally, the evidence establishes that the layoffs were made in order of seniority and that the laid off employees were replaced with more senior employees transferred from the Sault. No one has been hired from outside the company to replace any of the laid off employees. These findings, lend support to the explanation put forward by the employer. Indeed, if it was not for the fact that the employees in Elliot Lake were laid off in advance of the transfer of the more senior employees from Sault Ste. Marie, we would have concluded, notwithstanding the timing of the layoffs relative to the exercise of rights under the Act, that the layoffs were dictated by business considerations. However, when reference is had to the time-lapse between the layoffs

which took place in Elliot Lake and the transfer of employees from the Sault, we must come to a quite different conclusion.

29. Mr. Atherton was laid off effective March 25, some three weeks after signing a union card. The reason given for his layoff was the slowdown which was occurring in Sault Ste. Marie, the job which the company had contracted to complete in Elliot Lake had some 5 months to run with the complement then in place. The evidence of Mr. Crowle is that the company intended to work with about that complement so as not to accelerate the completion of its only remaining job in Elliot Lake. Mr. Crowle gave evidence that the company sought to keep as many of its employees at work as long as possible. Against this backdrop, Mr. Atherton was laid off on March 25th. With the exception of Mr. Aitken, who performed a few days' work in Elliot Lake in mid-April, no one was transferred from Sault Ste. Marie to Elliot Lake to replace Mr. Atherton until May 14th; some seven weeks after he was laid off. When it was put to Mr. Crowle that a seven week lapse between the time Mr. Atherton was laid off and the time he was replaced was inconsistent with his claim that Mr. Atherton had been laid off as a result of the slowdown in the Sault, he could give no explanation. Given the amount of work to be completed on the Elliot Lake project and the time-lapse between the layoff of Mr. Atherton in Elliot Lake and the transfer of employees from the Sault, we are forced to conclude that Mr. Atherton was not laid off for lack of work at Elliot Lake nor was he laid off because of the transfer of an employee from the Sault. In the absence of any other explanation by the employer we must conclude, having regard to the timing of the layoff relative to the union organizing campaign and the signing of a union membership card by Mr. Atherton, that he was laid off for anti-union reasons.

30. The remaining employees were laid off on May 7, 1982; well after the application in this matter and at a time when the employer knew that a hearing had been scheduled for May 14, 1982. It was at this hearing that the Board followed its long-standing practice in displacement applications for certification and directed the taking of a representation vote. Also in keeping with its long-standing approach the Board set, as a qualifying day for voter eligibility, the date of the hearing, May 14, 1982. The explanation given by the employer for the layoffs which occurred on May 7th, as with the layoff of Mr. Atherton on March 25th, was downturn in business in Sault Ste. Marie. As we have observed none of the employees from the Sault were transferred to Elliot Lake until May 14th; a week later. The layoffs in Elliot Lake on May 7th, 1982 therefore, were not occasioned by the exercise of bumping rights by employees in the Sault. The company chose to layoff these employees one week before the lack of work in the Sault forced the transfer of more senior employees. Again, in the face of the ongoing work in Elliot Lake and the continued employment in the Sault, of those who subsequently transferred from the Sault, we are forced to conclude that the layoffs which took place in Elliot Lake on May 7th were not brought on by a lack of work in Elliot Lake or by the transfer of employees from the Sault. In the absence of some other credible explanation we must conclude, therefore, that the layoffs of Lynn Jarratt, Randy Cadell and Ken Bishop, all of whom signed union cards, were motivated by anti-union considerations related to the processing of the instant application.

31. The second unfair labour practice allegation before us is whether the carrying on of negotiations between the respondent employer and the intervener trade union constituted unlawful interference in the organizing attempt of the applicant trade union

and/or constituted a breach of the statutory freeze provisions of section 79(2) of the Act. The applicant argues that, per se, the carrying on of these negotiations constitutes unlawful interference. The Board was faced with this issue in re *INCO* [1961] OLRB Rep. March 438 and stated, in refusing to reconsider an earlier decision:

“We came to the conclusion at that time in line with a long established policy that a displacement certification application cannot be treated as entitling either party unilaterally to suspend bargaining with the other and there is nothing in the legislation which suggests the contrary.”

32. There has been no further elaboration of the Board's position since 1961 nor is there anything in the Board's jurisprudence prior to 1961 which speaks to the “long established policy” referred to in the *INCO* decision *supra*. The Board's pronouncement at that time was before the enactment of what is now section 79(2) of the Act; a section of the Act designed to promote labour relations stability in the period immediately following the filing of an application for certification and the receipt of notice of same by the employer. Furthermore, it is our understanding, in the absence of the issue ever having being dealt with by the Board other than in the *Inco* decision *supra*, that very often collective bargaining does not take place in the face of a displacement application. In this situation an employer might be inclined to question the economic wisdom of negotiating an agreement which, if the incumbent is displaced, might serve as a floor in the subsequent negotiations with the successful applicant. On the other hand, an incumbent union faced with a displacement application might not be certain of the depth of its support if required to resort to economic sanctions and might, therefore, also be predisposed to suspend bargaining pending a resolution of the issue. Having regard to the present statutory framework and to our understanding of the parties' usual response when faced with a displacement application, it is, in our view, appropriate to approach the issue afresh.

33. The statute does not provide an easy and ready answer to the question which has been raised. Section 15 of the Act places an obligation on the parties to meet within 15 days of the giving of notice and to bargain in good faith and make every reasonable effort to conclude a collective agreement. Nowhere in the statute is the employer expressly relieved of his duty under section 15 except where an application is made under section 63 of the Act. Section 63(9) of the Act provides:

Where an application is made under this section, an employer is not required, notwithstanding that a notice has been given by a trade union or council of trade unions, to bargain with that trade union or council of trade unions concerning the employees to whom the application relates until the Board has disposed of the application and has declared which trade union or council of trade unions, if any, has the right to bargain with the employer on behalf of the employees concerned in the application.

The respondent employer relies on the absence of similar statutory language relieving of the duty to bargain in the face of a displacement application. The employer maintains

that in the face of his ongoing duty to bargain he had no choice but to bargain following the giving of notice by the incumbent.

34. Section 79(2) of the Act stipulates that where a union applies for certification, as did the applicant in this case, and the employer has received notice, as had the employer in this case, the employer, except with the consent of the trade union, shall not alter the rates of wages or any other term or condition of employment, or any right, privilege or duty of the employer or employees until the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union. The applicant argues that the prohibition against any alteration in the rates of wages or other terms or conditions of employment is clear and unequivocal, serves a very important industrial relations purpose, and must, therefore, foreclose the negotiation of a collective agreement designed to improve rates of wages and terms and conditions of employment subsequent to the receipt of notice of any application for certification.

35. If the applicant's submissions are accepted, Section 79(2) must be read as qualifying the duty to bargain under section 15 following the employer's receipt of notice of the displacement application. Otherwise an employer who refuses to bargain in the face of a displacement application might find himself faced with a complaint filed by the incumbent union alleging a failure to bargain in good faith. We note as well that under the mandatory provisions of section 16 of the Act the Minister, upon the request of either party, shall appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement where notice to bargain has been given under section 14 or section 53. The appointment of a conciliation officer begins a process, which, if agreement is not reached between the parties, satisfies the preconditions to a lawful strike or lockout. We will have more to say about the practical implications of suspending the duty to bargain in the face of the mandatory provisions for the appointment of a conciliation officer.

36. The NLRB has a long history of dealing with the issue which is before us in this case. The NLRB first dealt with this issue in *Mid-West Piping and Supply Company*, NLRB [1945], 70 LRRM 40. Under the doctrine laid down in *Mid-West Piping* and followed by the Board until recently, an employer faced with conflicting claims of two or more rival unions, giving rise to a "real question" concerning representation, could not recognize any of the unions until the right to represent had been established in an election. It was held that the carrying on of bargaining with either union constituted unlawful support and hence an unfair labour practice under section 8(a)(2) of the LMRA. However, in the recent *RCA Del Caribe* case (NLRB [1982] 110 LRRM 1369), the majority, with Chairman Van De Water and member Jenkins dissenting, relied on a "presumption of continuing majority status" in the face of the filing of an election petition by a rival union, which requires the employer to bargain with the union holding recognition as the bargaining agent. Indeed, the Board held that a refusal to bargain in such a case, as was required under the *Mid-West* doctrine, violates the duty to bargain. The majority stated at page 1370:

The recognition of the special status of an incumbent union indicates a judgment that, having once achieved the mantle of exclusive bargaining representative, a union ought not to be deterred from its

representative functions even though its majority status is under challenge. The Board has accordingly developed the doctrine of the presumption of continuing majority status in order to give a majority representative (either recognized or certified) some reasonable degree of insulation and freedom to fulfill its mandate from employees in its dealings with the employer. . . . While the filing of a valid petition may raise a doubt as to majority status, the filing, in and of itself, should not overcome the strong presumption in favour of the continuing majority status of the incumbent and should not serve to strip it of the advantages and authority it could otherwise legitimately claim.

The majority concluded that the requirement on an employer to withdraw from bargaining in these circumstances may not be the best way to ensure employer neutrality. It was reasoned that a withdrawal may be read by employees as signifying a repudiation of the incumbent. The majority also observed that a requirement that the employer withdraw from bargaining prevents the parties from dealing with changing economic conditions which might require an immediate response. The majority concluded:

This new approach affords maximum protection to the complementary statutory policies of furthering stability in industrial relations and of insuring employee free choice . . . even though a valid petition has been filed, an incumbent will retain its earned right to demonstrate its effectiveness as a representative at the bargaining table. An outside union and its employee supporters will now be required to take this incumbent opponent as they find it – as the previously elected majority representative.

The majority noted that if the incumbent retains its status as bargaining agent any contract executed would be valid and binding whereas, if the challenging union obtains bargaining rights, any contract negotiated between the employer and the predecessor would be null and void.

37. The dissenting decisions of Chairman Van De Water and member Jenkins focus on the scope for employer interference created by the majority decision and to a lesser extent on the practical considerations of bargaining in the face of a rival union's campaign, as discussed at paragraph 32 herein. Chairman Van De Water in dissenting from the majority states:

The selection process of a bargaining representative is no longer reserved to employees as the Act intended and provided, but instead is tainted by the employer's choice and ability to influence employees in matters that concern their employment . . . by engaging in either lawful hard bargaining or unlawful surface bargaining, the employer might cause the employees to become disenchanted with the incumbent. Thus, the advantages normally enjoyed by the incumbent could be erased and the employees' choice could be subtly influenced in favour of the outside union.

38. The approach adopted by the National Labour Relations Board in *RCA Del Caribe Inc.*, *supra*, is the approach supported by the employer and the incumbent union in this matter. It is an approach which, in our view, fits more easily into the Ontario statute and is to be preferred on the basis of practical labour relations considerations as well. In the first place, section 79(2) makes any change in the rates of wages or any other term or condition of employment or any right privilege or duty of the employees or employer, following notice of an application for certification, conditional on the consent of the applicant union. However, under section 5(4) of the Act an application for certification where the employees whose bargaining rights are sought are covered by a subsisting collective agreement, can only be made after the commencement of the last two months of the operation of the collective agreement. Under the provisions of section 56(1) of the Act the trade union that was or is a party to the collective agreement continues to represent the employees in the bargaining unit and the agreement continues to operate as it would have until the trade union that has applied to displace has been certified. It is contemplated, therefore, that the incumbent's bargaining rights continue and, where a collective agreement is in operation, that it continues to operate as it otherwise would, until the union seeking to displace has been certified. Given this statutory framework we are unable to accept the interpretation of article 79(2) put forward by the applicant.

39. Under the interpretation put forward by the applicant, no changes in wages or other terms and conditions of employment can be made following notice of its application without its consent. However, where the Act contemplates that displacement applications will be filed during the period in which a collective agreement operates, and where the Act provides that the agreement continues to operate notwithstanding the filing of the application, and where section 50 of the Act stipulates that the collective agreement is subject to and, for purposes of the Act, binding upon the employer and the trade union that is a party to it, we must conclude that regardless of whether or not the applicant union gives its consent, the wages and other terms and conditions of employment must remain as set out in the collective agreement. In these circumstances section 79(2) can have no application and cannot, therefore, in any way modify the duty to bargain.

40. Even if it could be argued that the application of the section is somehow suspended pending the expiry of the subsisting collective agreement or the expiry of the freeze provisions of section 79(1), whichever occurs later, it is difficult to conceive that the legislature would have intended to place the applicant in the preferred position of regulating changes in wages and other terms and conditions of employment and, by implication, to have modified the duty to bargain as between the incumbent union and the employer. Indeed, this result cannot be supported on a close reading of the section in the context of the Act as a whole.

41. Section 63(9) of the Act provides an express exemption from the duty to bargain. In the face of section 63(9) of the Act and in the absence of similar language relieving the employer of the duty to bargain when confronted with a displacement application, we would be hard pressed to read such a limitation into the language of section 79(2). Although section 79(2) prohibits the alteration of rates of wages or any other term or condition of employment, it also preserves any right, privilege or duty of the employer. The duty to bargain is a duty which may rest on an employer faced with a

displacement application for certification and accordingly, it can be argued that the duty to bargain, where it exists, is preserved by the freeze in these circumstances and overrides what would otherwise be a freeze on wages and terms and conditions of employment. This is an interpretation which fits with the Board's "business as usual" approach to section 79 as was enunciated in *Re Spar Aerospace Products Limited* [1978] OLRB Rep. Sept. 859 as follows:

"It should be emphasized that the 'business as before' approach dictates that the totality of the employment relationship be the subject of the freeze. In interpreting section 70, the Board does not place undue influence upon the term 'rates of wages' but recognizes that this term must be read in the context of the other words in that section. The words 'any other term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees' must also be given meaning and, in the Board's view, section 70 read as a whole manifests a legislative intent to maintain the prior pattern of the employment relationship in its entirety."

42. Furthermore, as we have observed, even if section 79(2) of the Act could be read as somehow suspending the duty to bargain in the face of a displacement application, the right of the incumbent union to seek and obtain the appointment of a conciliation officer continues. The appointment of a conciliation officer starts the process which, in the absence of an agreement by the parties, satisfies the preconditions necessary to a lawful strike or lockout. We cannot accept that the statute was designed to allow the parties to find themselves in a lawful strike or lockout position at a time when the duty to bargain is not in full force and effect. It is inconceivable that the legislature intended a union to find itself in a strike or lockout position at a time when it could not require the employer to bargain in good faith and make every reasonable effort to make a collective agreement. Conversely, it is inconceivable that the legislature intended to allow an employer to find himself faced with a strike for improved terms and conditions of employment at a time when a bargaining response would constitute a violation of section 79(2) of the Act.

43. It is our construction of the statute, in light of the practical labour relations considerations that we have discussed, that the duty to bargain is not in any way modified by the filing of a displacement application for certification. The freeze provisions of section 79(2), which preserve in place any "duty" of the employer, must be read as preserving the duty of the employer to bargain as he would have bargained had there been no displacement application. As the NLRB held in *RCA Del Caribe, Inc. supra*, the competing union must take the incumbent, as the lawfully certified bargaining agent of the employees whose bargaining rights are claimed, as he finds him.

44. The union suggested that if section 79(2) does not operate to stop the bargaining it should operate to prohibit the implementation of the terms of the agreement. In the face of those sections of the Act which make a collective agreement binding on the parties and provide for its enforcement, clear and direct statutory language would be required to support the result sought by the union. Section 79(2) which we have found preserves the duty, as between the incumbent and the employer, "to make every reasonable effort to conclude a collective agreement", suggests the

opposite result. The union was unable to point to any other section of the statute in support of its position that an agreement once negotiated, is somehow held in abeyance so that the just cause provision and other terms and conditions of employment are not put into effect and cannot be enforced, pending the disposition of a displacement application for certification. The carrying on of negotiations and the implementation of the terms of the resultant collective agreement do not, therefore, in and of themselves, constitute a breach of the freeze provisions of the Act or unlawful interference in the protected activities of the applicant trade union. Accordingly, this complaint, in so far as a breach of section 79(2) is alleged, is dismissed.

45. In interpreting the statute as we have, we have been troubled by the potential for mischief which exists where an employer bargains with an incumbent union in the face of a rival union's organizing campaign. We reiterate our observation that many unions and employers voluntarily agree to suspend bargaining pending the outcome of a displacement application. This decision does not in any way impede the making of such voluntary agreements to suspend bargaining. More importantly however, the employer's duty to bargain is to bargain as he would have bargained in the absence of a displacement application. If the employer, either on his own, or in conjunction with the incumbent, attempts to seize upon the vehicle of collective bargaining to interfere with employee freedom of choice, he is in violation of the Act. Notwithstanding the ongoing duty to bargain it cannot be used to effect an unlawful purpose and, if it is, the remedial authority of the Board can be brought to bear.

46. The evidence before us in this matter with respect to the conduct of the bargaining between the respondent employer and the intervener trade union does not support a finding of unlawful interference in the organizing efforts of the applicant. The negotiations, although completed in two meetings, followed a pattern which had developed over a 10 year period. The employer put forward a cogent explanation as to why he required an immediate settlement. The settlement, although it provides for a substantial narrowing of the differential between the IBEW rates and those paid under the intervener's agreement over the life of the agreement, was negotiated without any knowledge of the positions being taken by the parties to the IBEW province-wide negotiations which were being conducted concurrently. Furthermore, the settlement results in a 15¢ per hour increase in the differential between the rates under the IBEW province-wide agreement and the rates negotiated between the incumbent and the respondent company at the time when employees were to choose between the intervener and the applicant. We have not been satisfied that the employer, through the conduct of its negotiations with the intervener, interfered with the rights of the applicant. Accordingly, this complaint, insofar as the applicant alleges that the employer, through the conduct of its negotiations with the intervener unlawfully interfered in the exercise of its rights, is dismissed.

47. We now address the claim of the applicant that it should be certified without a vote. This claim rests upon submissions directed at the exercise of our discretion under section 7(2) of the Act and upon the application of section 8 of the Act. Section 8 of the Act provides:

Where an employer or employers' organization contravenes this Act so that the true wishes of the employees of the employer or of a

member of the employers' organization are not likely to be ascertained, and, in the opinion of the Board, a trade union has membership support adequate for the purposes of collective bargaining in a bargaining unit found by the Board pursuant to section 6 to be appropriate for collective bargaining, the Board may, on the application of the trade union, certify the trade union as the bargaining agent of the employees in the bargaining unit.

These are three preconditions which must be satisfied before section 8 can be applied. An employer violation of the Act must be established. It must be established that as a result of the employer violation of the Act the true wishes of the employees cannot be ascertained and, finally, it must be established that the union enjoys support adequate for the purposes of collective bargaining. It is to be observed, however that even if all three preconditions are met, the Board still has a discretion as to whether or not to apply the section.

48. We have found in this case that the layoffs of Messrs. Atherton, Jarratt, Cadell and Bishop were in violation of the Act and require a remedial response from the Board. None of the other allegations of employer misconduct have been made out. The Board reviewed the cases in which it has been asked to apply section 8 of the Act in *Re Globe and Mail*, [1982] OLRB Rep. Feb. 189 and made certain general statements with respect to the types of violations of the Act which will cause it to apply the section. The Board stated:

The Board has found in a number of cases that the employer, in violating the Act, made threats to the continued job security of his employees conditional on whether the union succeeded in its attempt to become certified. In these cases, the Board concluded that the employer violation of the Act was such as to make it unlikely that the true wishes of the employees could be ascertained. An employee is unable to express his true wishes where he has been told by his employer, either expressly or impliedly, and has reason to believe, that the selection of a union may cause the company to reduce the scale of its operation or close down with an attendant reduction in the number of jobs. (See *Dylex Limited, supra, Lorain Products (Canada) Ltd.* [1979] OLRB Rep. April 338, *Straton Knitting Mills Limited*, [1979] OLRB Rep. Aug. 801, *Sommerville Belkin Industries Limited*, [1980] OLRB Rep. May 791 and *A. Stork and Sons Ltd.*, [1981] OLRB Rep. April 419.)

The Board has also applied the section where the cumulative effect of a range of unlawful employer activities, none of which taken separately might call the section into play, has the effect of undermining the confidence in the rule of law which a reasonable employee is presumed to have and which gives a reasonable employee the confidence to make a free choice. In these circumstances the Board is forced to the inevitable conclusion that the true wishes of the employees are not likely to be ascertained. (See *Re Radio Shack, supra, K-Mart*, [1981] OLRB Rep. Jan. 60), *Skyline Hotels*

Limited, supra and *Robin Hood Multi Foods* [1981] OLRB Rep. July 972.)

49. The layoff for anti-union reasons of four bargaining unit employees from a bargaining unit of 22 employees is a serious unfair labour practice which, if it was not for the presence of an incumbent trade union, might cause the Board to certify the applicant under the provisions of section 8 or section 7(2) of the Act. The Board, however, in the exercise of its discretion under section 7(2) of the Act, has long given effect to a presumption of continuing majority support for an incumbent trade union. Although empowered to certify on the basis of documentary evidence of membership filed on behalf of more than fifty-five percent of those in a bargaining unit, the Board has consistently declined to do so where an incumbent trade union holds the bargaining rights which are sought. The Board requires the confirmatory evidence of a representation vote before it will exercise its discretion under section 7(2) of the Act to certify without a vote and thereby extinguish the bargaining rights of an incumbent union. In our view, the presumption of an incumbent's continuing majority status, absent any collusion between the incumbent trade union and the employer, is no less existent where the employer commits unfair labour practices designed to interfere with the applicant's organizing efforts.

50. Although an employer's unfair labour practice may work to benefit an incumbent trade union, we are hard pressed to conclude that we ought to ignore the status of the incumbent and certify the applicant without the confirmatory evidence of a representation vote. In the first place, the Board has a broad remedial authority to respond to employer misconduct and where the employer misconduct works to the benefit of the incumbent trade union, the Board can frame a remedial response designed to place the applicant in the position he would have been in had there been no employer violation of the Act. Secondly, if we were to certify the applicant without a vote, the result, given the status of the incumbent and the Board's long-standing practice in displacement applications, would be to penalize an innocent party. For obvious reasons, the Board is reluctant to penalize a union which otherwise would have received the benefit of a presumption of continuing majority status, in responding to the misconduct of the employer. Indeed, even where two unions are competing applicants and, therefore, the presumption of continuing majority status is not present, the Board has expressed a reluctance to respond to employer misconduct in a way that penalizes one of the two unions (see *Chandelle Fashions*, [1981] OLRB Rep. July 858). Finally, where the option to be put to the employees is between two unions, as in a vote conducted in connection with a displacement application, (and not between a single union and no union at all, as in a vote conducted in connection with a non-displacement application), it is a great deal more likely, given a thoughtful remedial response to the employer's unfair labour practice, that the true wishes of the employees will be given expression in a secret ballot representation vote. When reference is had to these factors, we must conclude that the scope for a section 8 response or for the exercise of our discretion under section 7(2) to certify without a vote in a displacement application is limited to those cases in which the incumbent has sought the assistance or otherwise acted in collusion with the employer in interfering with the lawful activities of the applicant trade union in a manner that makes it unlikely that the true wishes of the employees can be ascertained.

51. The National Labour Relations Board responds to employer violations of the Act which make it unlikely that the true wishes of employees can be ascertained with "Gissel" bargaining orders. (See *NLRB v Gissel Packing Co. Inc.* 395 US 575, 614, 71 L.R.R.M 2481 (1969).) In these types of cases the NLRB dispenses with the usual representation vote and directs the employer to bargain with the applicant trade union with a view to making a collective agreement. However, in *Business Envelope Manufacturers of Tennessee Inc.* (1976) 94 LRRM. 1351, the Board refused to issue a "Gissel" bargaining order where the employer had committed serious violations of the law designed to interfere with the applicant's organizing campaign and to assist the incumbent trade union. In the absence of evidence that the incumbent union sought the assistance of the employer or participated in its campaign of unlawful conduct, the NLRB, although it otherwise would have issued a bargaining order, refused to do so. The Board reasoned that "although the card majority is sufficient to raise a real question concerning representation, it is insufficient to establish majority status in the presence of a legitimate incumbent collective bargaining agent. . . . The Board cannot, therefore, issue a bargaining order establishing a collective bargaining relationship."

52. There is no evidence in this case that the incumbent trade union sought the support of the respondent employer or in any way acted in collusion with the respondent in the commission of unfair labour practices directed against the applicant. Although the misconduct of the employer is extremely serious, we have decided, for the reasons set out, that we should not exercise our remedial authority so as to extinguish the incumbent's bargaining rights. For the same reasons, we have decided not to exercise our discretion under section 7(2) of the Act to depart from our long standing practice of requiring a representation vote where an applicant trade union seeks to displace an incumbent. Rather, in the circumstances, we have decided to proceed by way of a representation vote and, at the same time, to exercise our remedial authority to restore the applicant, as best we can, to the position it would have been in had the employer not violated the Act. This is not to say, however, that the employer can use the duty to bargain to effect an unlawful purpose (i.e., interfere with right of its employees to select a bargaining agent of their choice). The employer is required to bargain as he would have in the absence of a displacement application.

53. We now turn to the question of remedy. Messrs. Atherton, Jarratt, Bishop and Caddell were adversely affected by their layoffs to the extent of having had their employment severed before it otherwise would have been. However, the evidence establishes that these employees have never been replaced by employees from outside the bargaining unit. The evidence establishes that the employer has suffered a severe decline in the volume of his business such that he was required to transfer more senior employees from Sault Ste. Marie to Elliot Lake on May 14, 1982. It was these employees who replaced those who had been laid off at Elliot Lake. We are satisfied on the evidence that had the layoff of Mr. Atherton not occurred on March 25th and the layoff of the other three not occurred on May 7th, all four of these employees would have been laid off on or about Monday, May 17, 1982, in any event. Indeed Mr. Atherton admitted that he knew that he would be laid off for lack of work. In these circumstances we hereby direct the employer to compensate each of the laid off employees in an amount equal to what he would have made had he remained at work until the Friday, May 14, 1982, plus interest. It is incumbent upon Mr. Caddell, who

had not been at work in the two week period prior to May 7, 1982, to establish that he would have returned to work in the period before May 7 and May 14, 1982. In addition, Mr. Jarratt, whose ballot has been segregated and who would otherwise be eligible to vote is hereby found to have been within the voting constituency at the relevant time and is therefore, eligible to vote and to have his ballot counted.

54. In our consideration of an appropriate remedial response we must also address the impact of the unlawful layoffs upon employee freedom of choice within the bargaining unit. In this regard we are faced with the realities of the economic downturn as it has affected the respondent employer. Many of those who voted on May 31, 1982 have been laid off and are no longer at work or resident in Elliot Lake. In so far as those who have been laid off are supporters of the applicant a fresh vote might work to the detriment of the applicant. We have decided, therefore, in the exercise of our remedial authority, to provide the applicant with an option. The applicant can rely on the vote which was taken on May 31, 1982. Alternately, the applicant can request that a new vote be ordered amongst those who were eligible to and voted on May 31, 1982. If the applicant opts for a fresh vote the respondent will be required to sign and post notices acknowledging its unlawful activity and its undertaking to refrain from any further interference with the exercise of the applicant's and employee rights under the *Labour Relations Act*. The respondent will also be required to mail signed copies of this notice to each of the employees eligible to vote. In addition, if the applicant opts for a fresh vote, the respondent will be directed to supply the applicant with a list of the last known home addresses of those who are eligible to vote. Finally, having regard to the layoffs which have taken place and the disbursement of many of the employees eligible to vote, a mailed ballot vote will be conducted.

55. The applicant is to advise the registrar within seven days of the release of this decision as to whether it is prepared to rely on the vote conducted on May 31, 1982 or whether it desires to have the Board direct the taking of a new vote

0519-82-U Kenneth Chisholm, Martin Gray, Russell Czech, Ronald Scott and Michael Taylor, Complainants, v. **Dominion Citrus and Drug Ltd.**, Respondent

Evidence – Practice and Procedure – Witness – Sub-poena requesting production of documents – Related to issues not set out in complaint – Board amending sub-poena and deleting inappropriate parts

BEFORE: Corinne F. Murray, Vice-Chairman, and Board Members C. G. Bourne and C. A. Ballentine.

APPEARANCES: *Alex J. Ahee and Philip P. Sanders for the complainants; Gordon Atlin, Q.C. for the respondent.*

DECISION OF THE BOARD; October 8, 1982

1. This is a complaint pursuant to section 89 of the *Labour Relations Act* alleging a breach of section 66 of the Act by the respondent, Dominion Citrus and Drug Ltd.

2. At the close of the first day of hearing evidence, the Board invited and heard representations by counsel as to the relevancy of the documents and materials subpoenaed by the complainants. At the hearing the Board was informed that one Steven Weiss, an employee of the respondent, had been served with a subpoena *duces tecum* the previous afternoon requiring that Mr. Weiss produce:

“All books and records pertaining to expenses incurred by Dominion Citrus and Drug Ltd. for services performed by Securicor Investigations and Security Limited from November 1, 1981 to April 30, 1982.

All books and records pertaining to expenditures made by Dominion Citrus and Drug Ltd. for the use of Rolling Stock during the period of November 1, 1981 to April 30, 1982.

All payroll books and records pertaining to employees in the employ of Dominion Citrus and Drug Ltd. from November 1, 1981 to April 30, 1982.”

The Board was advised that Mr. Weiss has not attended nor had the material subpoenaed been produced. The respondent objected to this subpoena because the large amount of material subpoenaed, together with the late service of the subpoena, amounted to an abuse of the Board's process. In the respondent's view the subpoena, in any event, was a fishing expedition and the documents referred to in the subpoena were not relevant to the proceedings. Counsel for the complainants argued that the documents subpoenaed were relevant because he “wanted to see the invoices to Securicor to establish the full heights of the role of Securicor” or the “degree of its involvement” which in turn established how the violence on the picket line was fueled by the company through their agents, Securicor. Records relating to the rolling stock were alleged to be necessary to

show the extent of the respondent's ability to operate during the strike through the use of Securicor personnel. In response Mr. Atlin for the respondent indicated his surprise at this suddenly becoming an issue and stated that the complainants ought not to be permitted to create a new issue.

3. The complaint lodged by the complainants sets out the following as a statement of the facts upon which they seek to rely:

- "1. The applicants were employed by Dominion Citrus and Drug Ltd. (hereinafter referred to as the Company) on or before February 11, 1982.
2. The applicants were members of the Warehouseman and Miscellaneous Drivers, Local Union 419, (hereinafter referred to as the Union).
3. Prior to February 11, 1982, the Union and the Company were engaged in a legal strike at the Food Terminal in Toronto, Ontario.
4. The applicants were actively participating on the picket line formed at the employers place of business.
5. On or about February 11, 1982, the Company and the Union reached a tentative agreement on a new collective agreement.
6. As a term of settlement of the new collective agreement, the Union and the Company agreed that the applicants, Messrs. Chisholm, Gray, Scott, Czech and Taylor would not be 'taken back' by the Company. The applicants state, and the fact is that they were discharged for their union activities during the strike."

Nowhere on the face of the complaint is the alleged involvement of Securicor nor the violence of the strike and its having been fueled by agents of the company disclosed.

4. The complainants have not satisfied the Board as to the relevancy of the material sought through the subpoena and the Board therefore will not require the production of the documents through Mr. Weiss. The Board has recognized in past cases that the substantial power it has to compel the attendance of witness and the production of documents must be exercised in a circumspect manner, and that a subpoena *duces tecum* will be set aside as abusive if great numbers of documents are called for and it appears they are not sufficiently relevant (*The Becker Milk Company Limited*, [1974] OLRB Rep. Oct. 732).

5. Rule 72 of the Board's Rules of Procedure, R.R.O. 546/80 requires a concise statement of material facts upon which the complainants intend to rely. The purpose of this Rule is to allow the respondent to know the case it must meet in discharging its heavy onus under section 89(5) of the Act. The complainants cannot through the means

of a subpoena add to or substantially vary the case the respondent is required to meet. This appears to be what the complainants are attempting to do in this case.

6. For all of these reasons the Board has ruled that the subpoena is amended to delete the portion requiring production of the documents.

7. This matter will be directed back to the Registrar for continuation of hearing scheduled for October 13 and 14.

0431-82-R Canadian Union of Public Employees, Applicant, v. Regional Municipality of Hamilton-Wentworth, Respondent

Certification – Employee – Persons employed in rehabilitation work program funded by government – Whether “employees” for purposes of Act (*Majority decision published [1982] OLRB Rep. Aug. 1179*).

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members S. Cooke and F. W. Murray.

DECISION OF BOARD MEMBER F. W. MURRAY; October 12, 1982

1. I dissent.

2. I would have found that the persons subject to this application are not employees within the meaning of the *Labour Relations Act*.

3. While it is clear that the employment conditions have many of the elements that could lead the Board to conclude that the subject persons are employees within the meaning of the Act, it is my opinion that the rehabilitative aspect of their employment is so paramount that I would conclude that they are not employees within the meaning of the *Labour Relations Act*.

4. It may be that they could be found to be employees under other legislation, i.e., *Workmen's Compensation Act*, *Unemployment Insurance Act*, *Income Tax Act*, but the *Labour Relations Act* clearly maintains an adversarial role between the parties. Indeed, some critics of the *Labour Relations Act* maintain that the adversarial role and arms' length relationship is nurtured to an unhealthy degree in the Ontario *Labour Relations Act*. Whether that be so or not, maintaining an adversarial role and arms' length relationship between the parties is clearly one of the keystones of the Act.

5. From the evidence I conclude that many of the trappings of a normal employment relationship have been introduced into the programme in an effort to show

the participants the positive aspects of earning a living and becoming a person with gainful employment within society.

6. Accordingly, I find that the persons subject of this application are not employees within the meaning of the Ontario *Labour Relations Act*.

1165-82-R Ontario Public Service Employees Union, Applicant, v. Industrial Resource Centre (Windsor/Essex) Inc., Respondent

Certification – Employee – Respondent providing training in skills to unemployed referred by Canada Employment – Program mostly funded by Canada Employment under contract with respondent – Usual deductions made from wages – Whether persons “employees” for purposes of Act

BEFORE: N. B. Satterfield, Vice-Chairman and Board Members J. Wilson and H. Kobryn.

APPEARANCES: *Barbara Linds and Bill Stammier for the applicant; R. D. Perkins and Frank Smith for the respondent.*

DECISION OF THE BOARD; October 22, 1982

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. The parties are agreed that the bargaining unit should be described as all office and clerical employees of the respondent at Windsor, Ontario, save and except the secretary to the general manager and persons above the rank of secretary to the general manager. While the parties have agreed on the description of the bargaining unit, they are not in agreement on who should be included in the unit.
4. The respondent, with the sponsorship of 30 businesses and 2 trade unions from the Windsor area and in co-operation with Canada Employment and Immigration and the Ontario Government, has established and operates a training centre in Windsor. One of the functions of the centre is to provide pre-apprenticeship training in three trades to approximately 160 persons. The persons presently in that program are already designated to be indentured to various of the 30 businesses as apprentices on completion of 44 weeks training. The parties agree that these persons are not employees of the respondent.
5. There is another application for certification before the Board, differently constituted, in which this applicant is seeking to represent in collective bargaining the persons who do the training of the participants in the pre-apprenticeship training

program. The parties agreed in that application to a bargaining unit described as an "all-employee" type of unit from which is excluded the "office and clerical staff". The application at hand is for office and clerical staff. The Board must resolve an issue of who is to be included in that unit. There is no dispute with respect to one person whom the respondent classifies as a program clerk, but five other persons are in dispute. The respondent characterizes these persons as "students" who are being trained in office skills in a manner parallel to the training of the 160 persons who are being prepared to enter apprenticeship training. The respondent asserts that, in the absence of apprenticeship programs for office and clerical jobs, these five students are being given "hands-on" experience in particular types of clerical and office functions in order to supply skills which will be needed by the supporters of the centre.

6. Towards the objective of supplying those skills, the respondent has entered into an agreement with the Canada Employment and Immigration Commission to sponsor and operate a program under the Commission's Canadian Community Development Projects. The respondent has contracted to provide individual training programs for two tool crib attendants, one office clerk intern, two receptionist/switchboard operators and one building maintenance man. The respondent has undertaken also to provide at least three of the students with full-time employment on completion of the project. When this application was made, there was no one in the building maintenance category.

7. The contract spells out the type of duties in which each person is to be trained, requires that orientation and training be provided Donna McIntyre, who is responsible under the contract for the day by day supervision of the project, and by other staff of the centre.

8. The contract specified also a variety of other conditions which the respondent as sponsor of the training project must satisfy. In setting forth these conditions, the contract variously refers to the students as "project employees", "employees of the project" and "employees in the employ of the project sponsor". These conditions require the respondent to:

- (a) supply each student at the beginning of the project with a copy of the Project's Personnel Policies and have the student sign them;
- (b) make all payments required of an employer by statute with respect to income tax, unemployment insurance, Canada Pension and Quebec Pension;
- (c) accept sole responsibility for the supervision and control of the students;
- (d) use the services and facilities of a Canada Employment Centre in order to fulfill the project's obligation of employing unemployed women and youth who are actively seeking work and registered with a Canada Employment Centre; and

- (e) maintain books and records of the financial management of the project to include the names, addresses and work of all "employees", their wage rates, the wage actually paid and the daily hours worked by each one of them.

9. The program will operate for a period of approximately eleven months. The final results of the training are to be reported to the Canada Employment Centre which will seek to place the students in employment with one of the thirty employers who support the respondent's training centre. If they cannot be placed, the respondent is responsible for providing full-time employment for at least three of them. The respondent's contract with the Commission is for a 52 week term. Counsel for the respondent informed the Board that it is the respondent's intention to attempt to negotiate a renewal of the contract prior to its termination.

10. The primary undertaking of the Canada Employment and Immigration Commission pursuant to the terms of the contract is to contribute an agreed sum of money "... for and in respect of wages paid to employees hired by the project sponsor to work on the project, ...". That contribution is based on the number of weeks of training which the students undergo at a weekly rate of \$168.00. The students are paid by cheque in the respondent's name at the rate of \$200.00 per week, which is made up of the \$168.00 funded by the Employment and Immigration Commission and \$32.00 from other revenues of the respondent. The respondent deducts from these payments the amounts required by statute for income tax, unemployment insurance and Canada Pension Plan.

11. It is on these representations of the parties as to the facts in this application that the Board must determine whether the five persons are employees within the meaning of the Act. If they are employees, all five of them would be in the bargaining unit described above, including the two who are referred to as tool crib attendants. If they are not employees within the meaning of the Act, all five of them would be excluded from the bargaining unit thus leaving only one person falling within that unit on the date on which the application was made. In that case, since section 6(1) of the Act requires that a bargaining unit shall consist of more than one employee, there would be no appropriate bargaining unit.

12. The respondent referred to these persons as "students" throughout the hearing and asks the Board to find that they are not employees within the meaning of the Act because they are persons partaking of a program funded by funds from the Federal and Ontario governments which has the purpose of helping them acquire individual skills applicable to office work which are likely to be required by the employers in their local community. Counsel contends that the persons are in the program for a specific and limited period of time at the end of which it is intended that they return to the regular employment market. They would be replaced, in turn, by another group of persons if the respondent is successful in negotiating a new contract with the Canada Employment and Immigration Commission, which persons might be trained in office skills of a different nature than the first group. The applicant contends that these persons were hired by the respondent, their wages are set by the respondent within the limits allowed by its contract with the Canada Employment and Immigration Commission and the work which they do in connection with their training is supervised by the respondent's staff.

The applicant further contends that the source of the funds from which the respondent pays these persons is not germane to the determining whether they are employees under the Act. The applicant asked the Board to find on these grounds that the persons are employees within the meaning of the Act and entitled to be represented in collective bargaining as provided in the Act.

13. Both parties referred the Board to its recent decision in *Regional Municipality of Hamilton-Wentworth*, [1982] OLRB Rep. Aug. 1179. In that decision the Board found certain persons employed in the Helping Hands program operated by the Social Services Department of the Hamilton-Wentworth region to be employees of the Regional Municipality of Hamilton-Wentworth within the meaning of the Act. The Board observed the Helping Hands program to have two purposes: "to assist the elderly; and to assist some of the chronically unemployed individuals on the welfare rolls to both provide for themselves through their own efforts and improve their job habits and skills sufficiently so as to be able to compete in the regular job market.". The funding for the program was shared in the approximate ratio of 80 per cent from the province and 20 per cent from the municipality. The average duration of employment for the approximately 28 persons was between one and one-half and two years, although "... as many as five individuals..." have continued to work in the program for five years. In deciding that these persons were employees, the Board found that it could not ignore some of the usual legal criteria of an employment relationship, criteria which are quite similar to those present in the instant case, although the employment duration of the Helping Hands program is longer and not for a term certain as it is here. On the other hand the weekly income is greater in the case at hand and the type of work which they perform is that which would commonly be found in the Windsor labour market.

14. The Board described the Helping Hands employees to be "... on the periphery of the Act's coverage,...". Counsel for the respondent suggests that the Board reached that conclusion because the purpose of the Helping Hands program was to keep people off the welfare rolls by providing them with alternative steady work and remuneration. He asks the Board to distinguish the instant case and find that the "students" are beyond the periphery of the Act's coverage because they have been diverted from the regular employment market into a "holding" operation to receive training preparatory to re-entering that market. The Board is not persuaded that there is any merit to that distinction. Both programs seek to equip persons who have difficulty sustaining regular employment to participate more effectively in a competitive labour market. The differences in the programs is one of the particular sources of the unemployed from which they draw their participants and how the programs approach the problem. There is nothing in those differences which would distinguish one group as employees under the Act and the other as not.

15. The five persons in question here were selected from amongst unemployed women and youths referred by a Canada Employment Centre and interviewed by the respondent before being offered one of the training opportunities. They are instructed and supervised by the respondent's staff, paid by the respondent on its own cheques from which the statutory deductions for income tax, unemployment insurance and Canada Pension are made. There can be no doubt from the respondent's contract with the Employment and Immigration Commission that the Commission is *not* the employer of these persons and that the respondent is. So, to the extent that an employment

relationship exists, it is between the respondent and these five persons. While they are in a learning situation and are being paid to learn new job skills, they are doing so by performing work functions for the respondent. They are not students in the usual sense of the word, as the respondent would like the Board to see them. Just as the Board found it difficult to ignore the indicia of the employment relationship in the "Helping Hands" case, so does the Board here find it difficult to ignore the fact that many of the usual signs of an employment relationship are present in this case. The fact that the five persons are employed only for approximately eleven months does not alter the fact that they are employees for that period. If the duration of the relationship were a basis for not making the collective bargaining process available to them, it would be difficult to reconcile that situation with students who are employed during school vacation periods and who are regularly found by the Board to be entitled under the Act to be represented in collective bargaining. Consequently, the Board finds that the five persons at issue are employees of the respondent within the meaning of the Act who are included within the bargaining unit description agreed to by the parties.

16. Having regard to that agreement, the Board further finds that all office and clerical employees of the respondent at Windsor, Ontario, save and except the secretary to the general manager and persons above the rank of secretary to the general manager, constitute a unit of employees of the respondent appropriate for collective bargaining.

17. For purposes of clarity, the parties have agreed that the tool crib attendants are included in the unit.

18. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on September 29, 1982, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

19. A certificate will issue to the applicant.

20282-81-U The International Association of Bridge, Structural and Ornamental Ironworkers Locals 721, 736, 759, 765, and 786, and Kenneth Childs, Allan MacIsaac, John Donaldson, Larry Baillie, Gordon Verdecchia, and Donald Melvin on their own behalf of each and every member of the aforementioned trade unions, and on behalf of the said local trade unions, Complainants, v. **The International Association of Bridge, Structural and Ornamental Ironworkers**, Norman Wilson, and James Phair, Respondents

Trusteeship – Unfair Labour Practice – International Union imposing trusteeship on District Council – Motivated partially by proper considerations – Earlier unfair labour practice complaint also factor – Board applying “taint” theory – Fashioning remedy to suit mixed motive situation

BEFORE: R. D. Howe, Vice-Chairman, and Board Members J. Wilson and C. A. Ballentine.

APPEARANCES: *James Hayes and David Bloom for the complainants; A. M. Minsky, N. A. Wilson, and J. Phair for the respondents.*

DECISION OF THE BOARD; October 6, 1982

1. This is a complaint under section 89 of the *Labour Relations Act* in which the complainants allege that they have been dealt with by the respondents contrary to the provisions of sections 70 and 80(2) of the Act. The essence of the complaint is that by placing the Ironworkers District Council of Ontario (the “Council”) under supervision and control (“trusteeship”) of the International Association of Bridge, Structural and Ornamental Ironworkers (the “International”) on or about December 10, 1981, and by various actions taken pursuant to that trusteeship, the respondents have intimidated, coerced, and penalized the complainants because they filed, or were about to participate in another complaint (the “EPSCA complaint”) under what is now section 89 of the Act, in Board File No. 2367-80-U.

2. In a decision dated February 17, 1982 in this matter (reported at [1982] OLRB Rep. Feb. 233), a panel of the Board comprised of the present Vice-Chairman and Board Members S. Cooke and J. Wilson, dismissed a motion for dismissal of this complaint without a hearing pursuant to section 71(1) of the Board’s Rules of Procedure. In addition, for reasons set forth in paragraphs 8 and 9 of that decision, the Board declined to defer to the internal procedures contained in section 7 of Article XII of the Constitution of the International (the “Constitution”), which provides:

“The General Executive Board shall have the power to place any Local Union or other subordinate body of the Association under direct International supervision whenever in its judgment such action is necessary for the purpose of correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements or duties of a bargaining agent, restoring demo-

cratic procedures, or otherwise carrying out the legitimate interests of the International Association; provided that such action shall be taken by the unanimous vote of the General Executive Board. The General Executive Board shall present to the next regular meeting of the General Executive Council its action in placing a Local Union under International supervision. At any time while a Local Union is under International supervision pursuant to this section, the General Executive Board may provide, at the expense of such Local Union, for liability insurance, protecting the International Association by virtue of any common law or statutory liability resulting from the act or omission of any officer, agent or employee while engaged in any activity pertaining to the business or affairs of such supervised Local Union. Within a reasonable time after the General Executive Board has placed a Local Union under International supervision, by the General Executive Board or its representative shall hold a full and fair hearing to determine the propriety of such action giving reasonable notice of such hearing."

(The Constitution also provides for an avenue of appeal to the General Executive Council from decisions of the General Executive Board, and a further appeal to the International Convention.)

3. Pursuant to Article XII, section 7, the General Executive Board (the "G.E.B.") scheduled a "trusteeship hearing" to be held in Toronto on March 17, 1982. During the continuation of hearing of this matter on March 10, 1982, counsel for the respondents advised the Board that the International was anxious to avoid any disrespect to the Board while this complaint was pending before it, and was also anxious to avoid any unfair advantage to any person or party that might possibly develop as a result of "parallel proceedings" under the Constitution. Accordingly, he indicated that if the Board was "in a position to venture any advice, opinion, or direction" with respect to whether the internal hearing scheduled for March 17, 1982 ought to be adjourned until the completion of the hearing of this complaint, the G.E.B. would be "inclined to pay very important heed to it". After hearing the submissions of counsel for the complainants and counsel for the respondents concerning that matter, and briefly recessing to consider those submissions, the Board made the following oral ruling (which has been incorporated into this decision at the request of counsel for the respondents):

"For reasons expressed in the Board's decision dated February 17, 1982 in this matter, the Board has declined to defer to the internal procedures set forth in the Constitution of the International. In the absence of agreement of the parties, we are not prepared to recess this matter and cancel the day of hearing already scheduled for Friday March 19, 1982. We wish to proceed expeditiously as possible to hear this matter. However, we do not wish to have our actions interpreted as an encouragement to defer the internal Union procedures. If the matter of the trusteeship can be resolved through that mechanism to the satisfaction of all of the parties hereto, that would be a very desirable situation from the point of view of this

Board, which encourages parties to resolve their difficulties internally wherever possible.”

(The Board was subsequently advised that the internal trusteeship hearing had been adjourned by the International pending completion of this case.)

4. The hearing of the merits of this matter commenced on March 8, 1982 and continued for a total of seventeen days in March, April, May, June, and July, including two days of final argument. The sole witness called by the complainants in support of their case in chief was the complainant Allan MacIsaac, who is the Business Manager and Financial Secretary of Local 721, another of the complainants in these proceedings. He was first elected as a full-time business agent for Local 721 in 1960 and has continuously occupied that position, or the more senior position of business manager, since that time. (Some of the larger local unions, such as Local 721, employ not only one or more business agents, but also a business manager. For ease of reference, those persons will be referred to compendiously as “business agents” or “business representatives” in this decision.) The complainants Kenneth Child, Larry Baillie, Donald Melvin, and Gordon Verdecchia are the elected business representatives of Locals 736, 759, 765, and 786 respectively. The complainant John Donaldson is the President of Local 721 and is also one of its three business agents.

5. During the course of his extensive examination in chief and cross-examination, Mr. MacIsaac provided the Board with a detailed exposition of circumstances which, it is alleged, give rise to an inescapable inference that the International placed the Council under trusteeship in order to penalize the complainants for filing and pursuing the EPSCA complaint, and in order to preclude or hamper the effective prosecution of that complaint.

6. The respondents’ witnesses were John Lyons, Norman Wilson, and James Phair. Mr. Lyons has been the General President of the International since November of 1961. Prior to becoming General President, he was a General Vice-President for three years and a General Organizer for four years. He has been a member of the Ironworkers since 1937. He is also the Senior Vice-President of the A.F.L.-C.I.O. Mr. Wilson was appointed by the International in 1958 as an acting General Organizer in Canada and was subsequently confirmed as a General Organizer. He became the International’s Director of Canadian Affairs in 1968. Mr. Wilson is responsible for coordinating all of the Ironworkers’ Canadian activities, and reports directly to Mr. Lyons through frequent written reports and telephone conversations. Mr. Phair is another of the International’s General Organizers in Canada. He was appointed as an acting General Organizer by Mr. Lyons in September of 1979, and was subsequently confirmed as a General Organizer. Mr. Phair reports directly to Mr. Lyons, but copies of his assignments and reports are forwarded to Mr. Wilson for his information.

7. Mr. MacIsaac was recalled by the complainants in reply. Peter Quinlan, the Recording Secretary of Local 736, was also called as a reply witness for the purpose of identifying and substantiating certain minutes.

8. There were a number of conflicts in the evidence that was adduced before the Board in these proceedings. The Board is of the view that many of those conflicts

merely reflect natural weakening of memories with the passage of time, and the tendency of witnesses to recall events in the light most favourable to their present concerns, rather than a conscious attempt to mislead the Board. In making our findings of fact in this matter, the Board has considered a number of factors including the firmness of the witnesses' respective memories, their ability to resist the influence of interest to modify their recollections, the consistency of their evidence, their capacity to express their recollections clearly, and their demeanour. We have also assessed what is most probable in the circumstances of the case, and what inferences may reasonably be drawn from the totality of the evidence.

9. The officers of the International are General President Lyons, General Secretary Juel Drake, General Treasurer Charles Anding, and nine General Vice-Presidents. The G.E.B., which is the body that placed the Council under trusteeship, consists of the General President, General Secretary, and a General Officer (usually, as in the circumstances of the present case, the General Treasurer) selected from time to time as a temporary member of the G.E.B. by the General President. The G.E.B. acts on all matters concerning the policy of the International. The Constitution also provides for a General Executive Council which consists of all twelve of the International's General Officers. The General Executive Council meets three or four times a year to review the activities of the International.

10. The International has a total membership of approximately 183,000, of whom about 20,000 are in Canada. Its headquarters are located in Washington, D.C. Twenty-five of the International's 318 local unions are located in Canada, as are two of its twenty-two district councils. As might be expected from the size of the International, many of the responsibilities of the General President, the General Secretary, and the General Treasurer, are delegated to subordinates in various departments.

11. The Council was chartered in the summer of 1976 and received a constitution and bylaws from the International. (For ease of reference, the Constitution and Bylaws of the Council will be referred to in this decision as the "Bylaws".) The objects of the Council are set forth in Article I of the Bylaws as follows:

"The object of this District Council is to create a harmonious feeling between the Local Unions and to settle all differences arising between them, promote an apprentice training [sic] to create a higher standard of skill, to secure adequate compensation for our work, to cultivate better relations between this Council and the employers, to assist our members to secure employment and to protect our members by legal and proper methods against any injustice that may be done them; to improve the standard of living, the moral and intellectual conditions of relations with the employers coming under the jurisdiction of the various Local Unions affiliated with this Council."

12. Membership in the Council is comprised of the Ontario local unions chartered by the International, including Local 700 (Windsor), Local 721 (Toronto), Local 736 (Hamilton), Local 759 (Thunder Bay), Local 765 (Ottawa), and Local 786 (Sudbury). The approximate membership of those six local unions is 600, 1900, 1500, 350, 400,

and 400 respectively. (Certain Ontario "shop" locals are also be eligible to participate in the affairs of the Council, but they have not generally been very active participants in the Council to date.)

13. The Council was preceded by the Ironworkers District Council of Eastern Canada (the "Eastern Council") which commenced operation in the late 1950's. Mr. MacIsaac testified that the Eastern Council was "generally a very effective body" from the time of its inception until the untimely death in 1967 of its President, Cliff Cooper, a General Organizer appointed by the General President of the International. Following Mr. Cooper's death there were long periods of time with no meetings officially called, although the business agents (of the local unions which made up the Eastern Council) continued to meet occasionally in an attempt to keep that body functioning. Although the business agents' efforts to have the Eastern Council "reactivated" were unsuccessful, their efforts appear to have been one of the factors that prompted the G.E.B. to re-establish district council operations in Ontario by chartering the Ontario District Council.

14. At the time of the installation of the (Ontario District) Council's charter, George Allen, an experienced District Representative, was appointed to the position of President of the Council by Mr. Lyons, who also appointed Mr. MacIsaac as First Vice-President of the Council, Donald Melvin as Second Vice-President, and Kenneth Childs as Financial Secretary-Treasurer. Other delegates to the meeting at which the charter was installed were appointed by the respective Presidents of the Local Unions on the authorization of Mr. Lyons.

15. Pursuant to what is now section 139(1)(a) of the *Labour Relations Act*, on March 31, 1978 the Minister designated the International and the Council as the employee bargaining agency to represent all ironworkers, except rodmen, represented by the International or Locals 700, 721, 736, 759, 765, and 786, in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario. The International and the Council were also designated at that time as the employee bargaining agency for rodmen. (Those designations were subsequently amended in a manner which is not material to the present proceedings.)

16. The Council has not functioned in the manner contemplated by its Bylaws in a number of respects. Although "regular meetings of the Business Agents" have been held monthly in accordance with Article IV, Section 1 of the Bylaws, regular meetings of the full Council have not been held semi-annually as required by that Section. Indeed, it is questionable whether a full Council meeting has ever been held since the inception of the Council. (Mr. MacIsaac testified that one full Council meeting had taken place on November 16, 1978, but the Minutes of that meeting, which identify it as "Meeting No. 9", cast some doubt upon that portion of his testimony. In any event, it is abundantly clear that full Council meetings were not held semi-annually as required by the Bylaws.) Thus, virtually all of the affairs of the Council have been administered by the business agents at their monthly meetings chaired by International Representative George Allen (or by Mr. MacIsaac in Mr. Allen's absence.) Mr. MacIsaac's explanation for the lack of full Council meetings was: "It was the responsibility of our President [George Allen] to set up full District Council meetings. He neglected to do so, but there were occasions when we requested permission of the International to have full District

Council meetings and for one reason or another they were denied.” (The only evidence of a formal request to the International for permission to hold such a meeting relates to a request made by Mr. MacIsaac in May of 1981, which will be dealt with in greater detail later in this decision.) During cross-examination, Mr. MacIsaac expressed the view that there was little necessity for calling full Council meetings since the same individuals would be involved “with the exception that the two other delegates [from each Local Union] would be in attendance”.

17. Article VII, Paragraph A of the Bylaws provides that nomination and election of officers “shall be held every four years at the regular spring meeting of the Council ... during the even year in between the regular quadrennial convention of the International”. No such election was ever held. Shortly after the Council was chartered, the Constitution of the International was amended so as to provide that the International Convention would be held every five years instead of every four years. Thus, Article VII of the Bylaws became “outdated” shortly after the Bylaws came into force. Pursuant to a motion passed at the January 19, 1978 business agents meeting, the following letter dated January 25, 1978 was sent on Council letterhead to the General Secretary of the International:

“Article VII – ‘Nomination and Election of Officers’ of the Ontario District Council states:

‘Nomination and election of officers shall be held every *four years* at the regular Spring meeting of the Council. This Spring meeting shall be during the *even year in between the regular quadrennial convention* of the International Association.’

Please advise as to when these elections should now be held as Article V ‘Conventions’ of the International constitution now states under section 1:

‘The regular Convention of this Association shall be held every *fifth year* between August 1st etc.’

Thanking you in advance for your cooperation, and anticipating an early reply, I remain,

Fraternally yours,

(signed)
Donald W. Melvin,
Recording Secretary.”

Mr. Drake’s letter of reply, dated February 7, 1978, reads:

“This will acknowledge receipt of your January 25, 1978 correspondence seeking guidance from this office with respect to Article VII of your Bylaws which is no longer applicable due to the change of

our International Conventions from every four to five years by action of the delegates of the last Convention.

Since said section is no longer applicable, it should be amended. District Council officers should be elected at least every four years in accordance with the policy of this International Association."

The amendment suggested by Mr. Drake was never made. The only explanation offered by Mr. MacIsaac for the failure to amend the Bylaws in accordance with Mr. Drake's suggestion was that the Bylaws Committee (described later in this decision) was unable to reach agreement concerning Bylaws amendments pertaining to the financial structure of the Council; apparently the Committee's inability to achieve a consensus on the matter of finances rendered it unwilling or unable to recommend Bylaw changes concerning less controversial matters such as election of officers.

18. At a business agents meeting of the Council in October of 1980 which was chaired by Mr. MacIsaac due to the absence of Mr. Allen, a motion was passed that an election of officers of the Council be held in February 1981. Mr. Allen subsequently wrote to Mr. Drake to request a ruling on the proper procedure. In his reply dated January 7, 1981, Mr. Drake, after noting that the question had already been answered in his letter of February 7, 1978, observed that Article VII, Paragraph A of the Bylaws had become "meaningless" as a result of the Constitution having been changed to provide for an International Convention every five years instead of every four years. He also wrote:

"... Therefore, prior to holding any nomination and election of officers of the District Council of Ontario, it will be necessary that the By-Laws be amended in accordance with Article XIV, the Amendment section of the District Council By-Laws.

In view of the above election of officers for the Council should not be held in February 1981 and you should be guided accordingly."

19. Another Council deficiency arose from the failure of the Local Unions to elect representatives of the Council in accordance with the Bylaws. Article III, Section 2 provides that each Local Union that is a member of the Council "shall be represented by not to exceed three (3) delegates; namely: the business agent and two elected members from each affiliated Local Union". Section 4 of that Article provides:

"Delegates shall be elected at the Regular election of their respective Local Unions and shall serve for a period of not to exceed three years, unless removed for cause as governed by the Constitution of the International Association of Bridge, Structural and Ornamental Iron Workers."

Despite that provision, none of the Local Unions in question elected delegates to the Council at their regular elections after the expiry of the terms of office of the delegates originally appointed by the respective Presidents of the Local Unions on the authorization of Mr. Lyons. Mr. MacIsaac testified that prior to 1981, the other two delegates

from Local 721 were elected by the membership at a regular (monthly) membership meeting of the Local, rather than at the time of the Local's regular election. It was not until October of 1981 that Local 721's Council delegates were elected at the time of the Local's regular election. Mr. MacIsaac's explanation for that failure to comply with the Bylaws was that the "past practice" of Local 721 "going back to 1957" (during the time of the Eastern District Council) was to elect delegates at a regular membership meeting rather than at the time of the Local's regular election. (Article III, Section 4 of the Constitution and Bylaws of the Eastern District Council also required that delegates "be elected at the regular election of their respective Local Unions".) Mr. MacIsaac further noted that "there is no provision under the International Constitution for the names of the delegates to the District Council to be included on the ballot, only the names of the regular [Local Union] officers" nor is there any provision in the election guidelines booklet published by the International. It was also his evidence that notwithstanding the fact that before each regular election Local 721 submitted to the International the names of all candidates and the positions for which they were running, the International "never questioned that the delegates to the District Council were not listed". He further testified that Mr. Allen, as a member of Local 721, was present at a regular meeting of that Local at which the Council delegates were nominated. Indeed, Mr. Allen himself was being considered as a possible nominee until he pointed out that he was already an officer of the Council. As President of the Council, Mr. Allen was also the person who reviewed the credentials presented by delegates who attended Council meetings. Thus, it is reasonable to infer that the International official who was appointed as President of the Council by Mr. Lyons, was aware that the delegates from Local 721 were not elected at Local 721's regular election as required by the Bylaws of the Council. However, there is no evidence which indicates that this failure to comply with the Bylaws came to the attention of Mr. Lyons or the other members of the G.E.B. prior to the investigations which immediately preceded the trusteeship.

20. One of the duties of the Financial Secretary-Treasurer of the Council specified in Article VI, Section 4 of the Bylaws, is to arrange for an audit of the Council's financial accounts to be made at the end of each quarter by a Certified Public Accountant. However, no such audits were carried out during the first years of the Council's operations. Mr. MacIsaac, who testified that he was aware that audits were not being performed as required by the Bylaws, candidly told the Board, "I find it difficult to justify why we didn't have an audit." However, he also testified that the "per capita fund was relatively easy to keep track of" and that he was satisfied that the funds were properly protected on behalf of the members. Although Financial Secretary-Treasurer Kenneth Childs attended the hearing of this matter, he was not called as a witness to explain why audits were not performed as required by the By-laws.

21. The Council has two sources of revenue. The only source specifically provided for in the Bylaws is a "per capita tax" paid monthly by each Local Union on the basis of a specified amount for each dues paying member during the previous month, pursuant to Article V of the Bylaws, which provides:

"Section 1. The revenue of this District Council shall be derived by a per capita tax as follows:

Ten cents (10¢) for each official monthly dues receipt sold (excluding retirees) the previous month from each Outside Erection Local

Union affiliated with this District Council and Five cent (5¢) for each official monthly dues receipt sold (excluding retirees) the previous month from each Shopmen's Local Union affiliated with this District Council.

Section 2. All per capita tax shall be due the first of each month based on the total of official monthly dues receipts sold during the preceding month.

Section 3. Any Local Union thirty (30) days in arrears shall not be entitled to representation in this District Council or derive any benefits therefrom until same has been paid.

Section 4. The funds for the District Council shall not be used for any purpose other than the legitimate expenses required by this constitution.

Section 5. Under no circumstances shall funds of this District Council be expended for the purchase of tickets for balls, benefits, picnics, raffles, nor for donations or loans.

Section 6. No gift shall exceed the amount of \$50.00."

Per capita tax contributions were kept in a Royal Bank account in Hamilton. However, since 1977 the major source of funding for the Council has been a one cent per hour (subsequently increased to two cents per hour) employer check-off to the "Ironworkers District Council Fund" hereinafter referred to as the "Council Fund") pursuant to the provincial "structural" agreement and the provincial "rod" agreement. For example, Article 30.5 of the May 1, 1980 to April 30, 1982 "structural agreement" provides:

"Each employer will contribute one cent (1¢) per hour for each hour earned by employees covered by this Agreement to the Ironworkers District Council Fund Effective May 1, 1981, the contributions will be increased to two cents (2¢)."

Contributions to the Council Fund were transmitted by employers to Eckler, Brown, Segal & Company Ltd. ("Eckler, Brown"), the administrator of that Fund, along with various other employer contributions, including the Ironworkers Trade Improvement Plan, the Ironworkers Central Welfare Fund, and the Ironworkers Ontario Pension Fund. Council Fund contributions were deposited by Eckler, Brown into a Royal Trust account in Toronto, from which various "lump sums" were transferred to the Hamilton Royal Bank account from time to time by the administrator on the instructions of President Allen and Financial Secretary-Treasurer Childs.

22. Decisions concerning the use of the monies derived from the per capita tax and the Council Fund were made by the business agents at their monthly meetings. After the business agents had approved a particular payment (such as an account payable or a disbursement) by motion duly moved, seconded, and voted on at such meeting, a cheque would be drawn on the Hamilton (Royal Bank) account by Messrs. Allen and Childs, who had signing authority with respect to that account.

23. Mr. MacIsaac testified that the Council Fund was used to finance transportation and accommodation for delegates who had to travel to Council meetings, legal fees incurred in relation to problems affecting the Local Unions, Local Unions were in financial difficulty, educational programs, hospitality and entertainment at conventions, and transportation, accommodation, and other fees pertaining to negotiations. It was Mr. MacIsaac's evidence that business agents were continually aware of the fact that there was no provision for the Council Fund in the Bylaws and of the resultant need to amend those Bylaws since there was "a consensus that the one cent per hour should come properly under the Constitution and Bylaws of the District Council". Accordingly, in April of 1977 a committee including George Allen, Allan MacIsaac, and Patrick Doyle was struck for the purpose of recommending Bylaw changes concerning the Council Fund and other matters. When Patrick Doyle resigned as Business Agent of Local 700, he was replaced on the committee in August of 1978 by his successor, Donald Stewart. The member of the Committee were unable to reach agreement on Bylaws amendment proposals with respect to the Council Fund, primarily because Mr. Stewart was of the view that the one cent per hour contribution should be transmitted directly to the Local Unions rather than being held centrally. Although agreement was reached on the desirability of various other amendments, such as removing the power of the Council President to negotiate collective agreements and to hire and discharge employees of the Council without the approval of the Council delegates, those proposed amendments were never adopted by the Council, nor sent to the G.E.B. for approval, as required by Article XIV of the Bylaws.

24. After discussing the Council's revenues and financial structure at a number of business agents meetings of the Council, the business agents passed the following motion on November 20, 1980 (in the words of Mr. MacIsaac) "to properly look after the one cent per hour contribution funds":

"That financial committee [sic], consisting of a representative from each participating local, be established to supervise and control the use of the 1¢ per hour deduction earmarked as a District Council Fund as per the collective agreement."

That motion was passed in the presence of James Phair at a business agents meeting of the Council chaired by Mr. Allen.

25. The financial committee, without the knowledge and consent of the International, contacted Dave Brown (of Eckler, Brown etc) and instructed him to prepare a draft trust document concerning the Council Fund. The committee also contacted the employer representatives who administered the "Industry Funds" to which employers were required to contribute under provincial agreements to provide a source of revenue for employer bargaining agencies. It was Mr. MacIsaac's evidence that the committee used the employers' procedures as a source of guidance in setting up procedures for handling the Council Fund. The committee also obtained legal advice with respect to the draft trust document. The committee's efforts culminated in the execution of a Memorandum of Agreement and Declaration of Trust (the "trust document") of July 23, 1981. That document was signed by all of the members of the financial committee: James Harrower (the business agent for Local 700) and the complainants Kenneth Childs, Allan MacIsaac, John Donaldson, Gordon Verdecchia, and Donald Melvin. They each

signed in two capacities, namely, as representatives of the Local Unions (700, 721, 736, 759, 765, and 786), which are identified in the trust document as the parties “of the first part”, and as trustees, who are identified therein as the parties “of the second part”.

26. Before the trust document was signed, it was amended by deleting many of the references to the “District Council” and by substantially broadening the uses which could be made of the monies in the fund. The original draft had provided (in Article II, Section 1) that the trust was to be used “solely and exclusively for financing the activities of the District Council ... and the Local Unions in the negotiation and implementation of collective labour agreements and such other activities *related thereto* as the Trustees may from time to time approve” (emphasis added). That section was amended by deleting the underlined words; thus, the trustees gave themselves an extremely broad discretion to use the funds for any activities which met with their approval. The trust document also provided that questions concerning any action to be taken by the trustees would be decided by a majority of the votes cast by trustees present at a meeting attended by at least four of the six trustees.

27. Mr. MacIsaac testified that the trust document was executed to protect the funds in the interest of the membership. While that may well have been one of the purposes of establishing the trust fund, the Board finds that another purpose was to ensure that District Council funds would be available to provide financing for the EPSCA complaint (as will be discussed in greater detail later in this decision). The members of the financial committee also wished to have the money “outside of the District Council Bylaws” so that loans could be made to Local Unions that were experiencing financial difficulties.

28. Although it is highly probable that Mr. Allen was aware of the existence and operation of the trust fund, there is no evidence that he informed Mr. Wilson or anyone at the International’s headquarters about it, nor was headquarters apprised of it prior to late November of 1981 by Mr. Wilson or Mr. Phair.

29. It is clear from the evidence that a number of differences of opinion have arisen over the years between officials of the International, including General President Lyons and Canadian Director Wilson, on the one hand, and Mr. MacIsaac and various other officials of Ironworkers Local Unions in Ontario, on the other hand. For example, the latter were of the view that it would be “desirable to hold periodic Canadian conferences to deal with problems facing the Canadian Ironworker”, but the former rejected that view on the basis that a separate conference for Canadian Local Unions “would not merit the additional costs involved”, and on the further basis that “differences between labour laws from province to province would negate the ability of a Canadian conference to deal effectively with that question”. (The International holds regional conferences midway between International Conventions. Some Canadian Local Unions attend the eastern conference, while others attend the central conference or the western conference.)

30. Decisions by the International to withhold “per capita tax” payments to the Canadian Labour Congress (the “CLC”) at various times (as a result of certain areas of disagreement between the international building trades, including the respondent International, and the CLC, which need not be detailed in this decision) were also the source

of substantial controversy. The business representatives who were members of the Council generally supported the CLC's desire for higher standards of self-government within Canadian locals of international trade unions, and were generally opposed to the International's decisions concerning the withholding of per capita tax, although they shared the International's concern about some of the issues, such as the CLC voting structure and the CLC's acquiescence concerning building and construction trades activity by the Quebec Federation of Labour in direct competition with the established Building and Construction Trades Council in the Province of Quebec, in which the International was an active participant. The business representatives expressed their concern by supporting various motions (implemented by telegram and letter) urging Mr. Lyons to restore payment of the CLC per capita tax and maintain the Ironworkers' affiliation with that body.

31. Another major area of controversy between the International and officials of the Council was the matter of bargaining rights in respect of the Electrical Power Systems Construction Association ("EPSCA"). That employers' association, which was established in 1973, represents (for purposes of collective bargaining) Ontario Hydro and various contractors which perform work on Ontario Hydro sites. Although many of the other building trades negotiated with EPSCA prior to 1978, it was not until then that the Ironworkers negotiated with that Association. Prior to 1978, there was a series of collective agreements between the International and Ontario Hydro. (The degree to which officials of the Ontario Ironworkers Local Unions participated in those negotiations is a matter of dispute between the parties which need not be resolved in the present case.) However, in 1978 it became necessary (as a result of Ontario Hydro's insistence) for the Ironworkers to negotiate with EPSCA. This caused a great deal of concern on the part of the business agents who represented the Local Unions at the Council as they were of the view, not shared by officials of the International, that the Local Unions, and through them, the Council, had bargaining rights in the electrical power systems sector for some of the contractors which belonged to EPSCA, and that those bargaining rights might be lost as a result of negotiations between the International and EPSCA. Their concern was heightened by the fact that the first Ironworkers collective agreement with EPSCA bore only the signature of Mr. Lyons, and not the signatures of the Local Union officials who had signed the memorandum of settlement which preceded that collective agreement. (Whether the persons signed as representatives of the Local Unions or as representatives of the International is also a matter of dispute). Their concerns were consistently made known to various International officials including Messrs. Lyons, Wilson, and Allen, but despite repeated efforts they were unable to reach a mutually satisfactory resolution.

32. That contentious matter came to a head in 1980 during negotiations concerning the provincial (reinforcing) rod agreement between the Rodmen Employer Bargaining Agency and the Rodmen Employee Bargaining Agency (which consists of the Council and the International). After conciliation procedures had been exhausted and the employees were in a position to legally strike, Mr. MacIsaac and other business representatives became aware that the International and EPSCA had entered into a collective agreement which purported to cover rodmen employed on Ontario Hydro projects. The business representatives were very disturbed by that development, the impact of which Mr. MacIsaac described as follows: "It took away practically all of our bargaining power with the Rodmen Employer Bargaining Agency [because] the major

part of our reinforcing rod work was done on Ontario Hydro projects." Mr. Wilson, on the other hand, testified that the signing of that agreement would not lessen the bargaining power of the Local Unions in provincial bargaining because "the provincial rod agreement doesn't cover the electrical power systems sector; it only covers the ICI sector". (It is unnecessary for the Board to determine in these proceedings whether Mr. Wilson's view is correct or incorrect. The scope of the bargaining rights in question is one of the major issues in the EPSCA case and must await resolution in the context of those proceedings.)

33. Mr. MacIsaac and other business representatives continued to vociferously complain to Messrs. Lyons, Wilson, and Allen about the EPSCA situation. They arranged to meet with Mr. Lyons on July 23, 1980 during an Ironworkers Northeastern Regional Conference in Toronto. At that meeting, they expressed their views concerning the history of the bargaining rights pertaining to work performed on Ontario Hydro projects. Since there were differences of opinion on that matter, Mr. Lyons requested them to forward their views to him in writing. Messrs. Childs and MacIsaac complied with that request by letter dated August 1, 1980. On August 15, 1980 Mr. Lyons made an interim reply to that correspondence, in which he advised that there were significant discrepancies and that a full investigation would be made on the subject. After spending several weekends reviewing "a three foot stack of papers" which he described as "the complete record of what [had] transpired in connection with Ontario Hydro's construction operations", Mr. Lyons forwarded to the business representatives a detailed, five page letter in which he set forth the basis for his conclusion that the International had maintained the same approach which it had historically adopted concerning Ontario Hydro negotiations. He also concluded that since bargaining rights in respect of work performed on Ontario Hydro projects had been vested in the International for 27 years, there was no logic in approaching Ontario Hydro or EPSCA for the purpose of seeking to substitute the Local Unions in place of the International, as parties to the EPSCA agreement.

34. In mid September of 1980, a telegram was sent to Mr. Lyons advising him of the District Council's intention to contest the legality of the agreements between the International and EPSCA. President Lyons responded through the following telegram on September 17, 1980:

"On the afternoon of 9/16/80 telegram from D. Melvin, Recording Secretary, Iron Workers District Council of Ontario, was received stating:

'Further to direction perceived at the District Council meeting on September 11, 1980 I am advising you of the following. It is our intention to contest the legality of the agreements with E.P.S.C.A. which were signed by International Officers of this Association without the authority of the respective membership or the Locals concerned. We will be seeking recourse as per the provision [sic] of the Labour Relations Act of Ontario.'

The meeting identified in this telegram precedes the conclusion of my investigation into factual situation surrounding historical prac-

tices of Ontario Hydro agreements. A decision on the part of involved Local Unions to take imprudent actions during the course of an investigation of which the involved Local Unions were aware and which commenced July 23rd and concerning which all interim communications indicated would be completed in a reasonable time indeed raises serious questions. I have been advised the results of my investigation have been transmitted 9/15 and 9/16, 1980 to all involved Local Unions who are also affiliates of the District Council of Ontario. I must, therefore, assume that actions set forth in your telegram will not be undertaken since they are even more ill-advised now that the Local Unions have received a complete statement as to the historical facts of Ontario Hydro agreements. In any event, however, let me caution you and others whose decision was described in your telegram that any action of such nature would be in complete violation of the Constitution of this International Association in addition to being an effort contrary to the best interests of the membership in Ontario and, accordingly, will be considered an [sic] evaluated in that light."

The complainant business agents construed that telegram as a threat that trusteeship would be imposed by the International if they participated in a proceeding under the *Labour Relations Act* in relation to the EPSCA agreement. However, in his testimony before the Board, Mr. Lyons stated that the telegram was not intended to threaten trusteeship, but rather was merely calling to their attention the fact that their proposed action would be in violation of the Constitution. Nevertheless, he agreed in cross-examination that "the telegram would cause people some concern", and added, "That's why we sent it." It was also his evidence that the International sends about a hundred such telegrams per year.

35. On September 23, 1980 a complaint (Board File No. 1300-80-U) was filed under what is now section 89 of the *Labour Relations Act* against the International, Norman Wilson, Ontario Hydro, and EPSCA, in which the present complainants (excluding Gordon Verdecchia), the Council, the Rodmen Employee Bargaining Agency, Local 700, and one Jim Lajeunesse complained that they had been dealt with by the respondents therein contrary to the provisions of what are now sections 64, 67, and 68 of the Act in respect of the 1978-80 and 1980-82 "rod" collective agreements which the International entered into with EPSCA. By letter dated September 25, 1980 to the Registrar of the Board, Maurice A. Green of Golden, Levinson sought to expand that complaint as follows:

"We are instructed to complain to the Board of further and additional misconduct engaged in by the Respondent International.

In September, 1980, the complainant District Council advised the Respondent International by telegram that, in view of the conduct of the International and the other respondents, 'we will be seeking recourse as per provisions of the Labour Relations Act of Ontario'.

On or about September 16, 1980 the General President of the Respondent International replied to this advice by telegram stating

inter alia that 'any action of such nature would be in complete violation of the constitution of this International Association'.

The complainants state and the fact is that this telegram constitutes a clear threat that trusteeship will be imposed upon the complainants for the sole reason that they are about to participate in a proceeding under the Labour Relations Act. This conduct violates Sections 56, 61, and 71 of the Act.

The complainants accordingly request that the Board direct the following additional relief:

1. Declaration that such conduct violates the Act;
2. Cease and desist order reaching the Respondent International and any officer, employee, agent and/or other person acting on behalf of the Respondent International from threatening any of the individual complaints or any member or employee of the union complainants or imposing or purporting to impose any of the complainants in trusteeship for the reason that they are about to or have exercised their statutory rights under the Labour Relations Act."

36. At a meeting in Washington on October 30, 1980 between the representatives of the parties to that complaint, it was agreed that the complaint would be withdrawn since Mr. MacIsaac and the other persons in attendance thought that the EPSCA situation had been satisfactorily resolved. Mr. MacIsaac's testimony (in chief) concerning the resolution of that dispute was:

"We thought that we had all our problems resolved. We reached an understanding on the membership having a right to vote on the collective agreement – that they had a right to do so. We reached an understanding that the agreement should not be signed until the members vote on it. There was agreement that the Local Unions would participate in negotiations; the Local Unions would submit proposals and they would select a bargaining committee. We were also instructed by our General President on our return to Ontario to contact Ontario Hydro officials, or EPSCA' in order to clear up some outstanding issues of the current collective agreement."

Unfortunately, Mr. Lyons' understanding of the resolution was materially different from that of Mr. MacIsaac. Thus, relations between the complainants and the respondents with respect to EPSCA continued to fester due to substantial differences of opinion among the parties concerning the basis upon which the matter had been resolved.

37. By February of 1981, it had become apparent to Mr. MacIsaac and the other complainants in the EPSCA case that the matter had not in fact been resolved to their satisfaction. In particular, the meeting which they wished to have with EPSCA concerning revision of the "rod" collective agreement that was in force at that time did not materialize. Accordingly, a second section 89 complaint (File No. 2367-80-U) was

filed with the Board on February 3, 1981 pertaining to the EPSCA situation. That complaint included all of the allegations that were contained in the first EPSCA complaint plus a number of allegations with respect to events which followed the filing of the first complaint. (For ease of reference, that second complaint (File No. 2367-80-U) will be referred to in the remainder of this decision as the "EPSCA complaint".)

38. Hearings in respect of the EPSCA complaint scheduled for March 17, 19, and 20, 1981, were adjourned until April 9, 1981 on the agreement of the parties. At the April 9th hearing, another panel of the Board heard submissions concerning a number of preliminary matters and reserved its decision on them. The gist of that complaint and counsels' preliminary submissions are reflected in the following passage from that panel's decision dated September 17, 1981 (reported at [1981] OLBR Rep. Sept. 1244):

"1. The complainants have complained that the complainants have been dealt with by the respondents contrary to the provisions of sections 56, 59(1)(2) and 60 of *The Labour Relations Act*. Briefly, the complainants have alleged that collective agreements have been concluded by the respondent International Association of Bridge, Structural and Ornamental Ironworkers (the 'International') through the respondent Norman Wilson without either consultation with the complainants or considering their proposals. The complainants have also alleged that the collective agreements with Ontario Hydro and the Electrical Power Systems Construction Association ('EPSCA') which have been concluded have not been subject to the usual approval by the membership of each complainant local trade union.

2. The complainants have requested a declaration that the respondents have breached the provisions of the Act referred to in paragraph one and (i) a declaration that the purported collective agreements signed by the International encompassing ironworker rodmen are null and void and that the respondent (sic) be ordered to permit the complainants to participate in the process of negotiation including the requirement that the respondents place before the relevant employer association or Ontario Hydro each and every proposal agreed upon for inclusion in negotiations by the membership of the complainants and of the District Council, (ii) a declaration that the respondents make every reasonable effort to negotiate and support such proposals, (iii) a declaration that the respondent (sic) be ordered to permit the complainants to subsequently hold ratification meetings to either approve or reject the proposed collective agreements, (iv) a declaration that the International reinsert the 'signing page' of one of the collective agreements, as originally approved and ratified by the complainants, (v) a declaration that EPSCA and/or Ontario Hydro be ordered to cease and desist from requiring members of the Rodmen Employer Bargaining Agency to adhere to or agree to implement the terms of the collective agreement, if any, entered into between EPSCA and the International

encompassing rodmen, when such members of the Rodmen Employer Bargaining Agency submit bids for work to be performed on projects of Ontario Hydro and that EPSCA and Ontario Hydro be ordered to bargain only with the International when a negotiating committee of the International is present and made up of representatives from each complainant local trade union or its approved delegates, (vi) a declaration that, if the Board declare null and void the said collective agreements as herein requested, the terms and conditions set out in such agreements be frozen pursuant to the provisions of the Act until the parties have met and negotiated and the requirements of the Act have been satisfied before such terms and conditions can be altered, (vii) a declaration that, if the International, Ontario Hydro and EPSCA be ordered to pay all damages arising out of their illegal actions and which give rise to loss of income and benefits to each member of the complainants who have been forced to work under agreements which they had no opportunity to authorize or ratify, such monies be paid with interest from the date at which they should have been received, and (viii) an order that the respondents be ordered to pay all legal costs of the complainants arising out of this complaint.

3. At the commencement of the hearing in this complaint, counsel for the International and Norman Wilson made a motion to strike out the names of the International Association of Bridge, Structural and Ornamental Ironworkers District Council of Ontario (the 'Council'), the Rodmen Employee Bargaining Agency (the 'Agency') and the International Association of Bridge, Structural and Ornamental Ironworkers, Local 700 ('Local 700') from the list of complainants in the style of cause. *Counsel informed the Board that it was his information and understanding that the Council had not authorized the making or filing of a complaint and that such a complaint had not been authorized under the constitution of the Council in that there had not been a duly convened meeting as required under the constitution.* Counsel pointed out that the Agency pursuant to a designation by the Minister of Labour dated March 21, 1978, consisted of the International and the Council. It was the position of counsel that his client the International had neither been asked for its approval nor given its consent to any proceeding against itself. It was his position that, in the absence of any constitution and by-laws for the Agency, the consent of the International and the Council is required in order to commence any proceeding under the Act in the name of the Agency. Counsel informed the Board that he had been advised by James Harrower, the business agent of Local 700, that Local 700 did not wish to be part of these proceedings and that Mr. Harrower would so inform counsel for the complainants.

4. Counsel for the International and Mr. Wilson argued that the onus of establishing authority or competence to act lies on he who

asserts an authority or competence to act. Counsel further argued that the Agency is a statutory creation under section 127(1)(a) of the Act and consists of the International and the Council. Counsel stressed that an entity such as the Agency which had neither a constitution, by-laws or officers could not only act by consensus and that in the circumstances consensus meant unanimity. *It was the position of counsel that the International had never authorized this proceeding and that the Council had never held a meeting where it had been determined that this complaint should be brought before the Board. Counsel characterized any meeting of business agents who are representatives on the Council as merely a meeting of these business agents and not a meeting under the constitution and by-laws of the Council.* Counsel further argued that, in any event, none of the complainants may make a complaint under section 60 because none of the complainants are employed and that none of the business agents named as complainants may make a complaint under section 59(2)."

(emphasis added)

39. In an effort to have a full counsel meeting held, Mr. MacIsaac sent the following telegram on May 6, 1981 to Mr. Allen:

"Respectfully request that business agent meeting of Iron Workers District Council of Ontario scheduled Thursday May 21 81 be declared a full District Council Meeting. This request meets with the approval of Business Agent [sic] of Locals 721 736 759 765 and 786. Each Local is prepared to have these [sic] delegates in attendance.

You should be advised that we have not held a full District Council Meeting under our charter which was issued in June 1976.

Business Manager Local 721 and Vice President of District Council Allen MacIsaac on behalf of Locals."

Under the circumstances, it is reasonable to infer that one of the major reasons why Mr. MacIsaac wished such a meeting to be held was to enable the Full Council to pass a motion authorizing the filing of the EPSCA complaint on behalf of Council and retaining Golden, Levinson as its counsel in respect of that complaint. It is also reasonable to infer that officials of the International were aware that this was one of the major reasons why such a meeting was desired.

40. Mr. Allen sent a copy of that telegram to Mr. Lyons and asked what he should do. That request prompted Mr. Lyons to cause a check to be made of the Council records on file at the International's headquarters. Having discovered that those records verified Mr. MacIsaac's assertion that there had never been a full Council meeting, Mr. Lyons asked his staff to find out who were the delegates who had "sat back for five years, never held a meeting, and never said a word". A check of the ballots filed by the Local Unions in respect of their elections revealed that no delegates had been elected.

Mr. Lyons then "scanned some of the files" himself and discovered a letter from Mr. Allen to Mr. Childs requesting an audit. When a review of the General Treasurer's records revealed that no audits had been filed by the Council, Mr. Lyons directed the General Treasurer to assign a member of his staff to further investigate the matter.

41. Mr. Lyons' response to Mr. Allen's telegram is set forth in the following letter, dated June 12, 1981, to Mr. Allen, a copy of which was sent to Mr. MacIsaac for his information:

"In your report of May 7, 1981 you attached a copy of a telegram from Allen [sic] MacIsaac, Business Agent of Local Union No. 721, in which he requested the May 21, 1981 Business Agents meeting be declared a full District Council meeting. In that telegram, in support of that request he stated, 'You should be advised that we have not held a full District Council meeting under our charter which was issued in June 1976.'

I was quite surprised to see that comment and immediately commenced an investigation which investigation is still continuing. It was quickly established that in accordance with our records the above statements is correct. The investigation then established that of the nine (9) Local Unions eligible to be affiliated with the Ontario District Council eight (8) of these Local Unions did not in their last election place on the ballot or elect the two (2) additional delegates to the District Council that the By Laws of the District Council requires. These two delegates are in addition to the Business Agent who in accordance with the By Laws of each Local Union is a delegate to the District Council by virtue of office. Local Union No. 834 is the only Local Union that nominated and elected its full delegation.

Therefore, not only has the District Council not held meetings, but also sixteen (16) of the potential twenty-seven (27) Local Union delegates have never been elected. Under this set of circumstances, a meeting of the District Council to conduct any form of business is totally inappropriate. *Therefore, no meeting should be scheduled until the General Executive Board has met to discuss and determine what course of action would be appropriate under the existing circumstance.*

The investigation of the District Council that I commenced for the reasons described above will continue and you will be further advised."

Consequently, the full council meeting that had been scheduled to be held on June 18, 1981 by Mr. Allen pursuant to Mr. MacIsaac's request, did not take place. However, a business agents meeting was held that day at which an account pertaining to the EPSCA case was presented for payment. When Mr. Allen advised the business agents that he had been instructed by Mr. Lyons not to approve or to sign any cheques on behalf of the Council, Mr. Childs stated that since it was apparent that they would be unable to

properly conduct any further business, he was making a motion to adjourn. That motion was seconded and carried. In a discussion which took place in a coffee shop after that meeting, some of the business agents questioned why Mr. Lyons would instruct Mr. Allen not to sign any further cheques. In response to that question, Mr. Allen informed them that the Council money was really money belonging to the International and that they were not going to use it against the International by paying legal fees concerning the EPSCA complaint.

42. It appears from the evidence adduced before the Board in these proceedings that Mr. Allen misinterpreted Mr. Lyons' instructions concerning the signing of cheques. Rather than directing that no cheques be signed, Mr. Lyons had intended only to stop "unusual" expenditures, such as payment of legal fees and other expenses in respect of actions against the International, since he was of the view that such expenditures were not a proper use of Council funds. He had not intended to preclude reimbursement of "normal" expenses in connection with meetings of the business representatives. When he became aware of that misunderstanding, he sent a clarifying letter to Mr. Childs and Mr. Allen. Despite that misunderstanding, we are satisfied on the basis of all the evidence before us, that the purpose of Mr. Lyons' instructions to Mr. Allen concerning the signing of cheques was to remove the Council as a source of financing for the EPSCA case. The subsequent clarification of his instructions did nothing to modify the realization of that objective.

43. On June 19, 1981, Mr. MacIsaac wrote to Mr. Lyons to express his grave concern that the latter had ordered what he perceived to be a suspension of the operations of the Council. Mr. MacIsaac also noted that Canadian Director Norman Wilson, International Representative George Allen, and General Organizer James Phair had attended "many regular monthly meetings of the District Council over the [preceding] five years" and had never voiced any objection to the composition of the Council. In his response dated July 7 of that year, Mr. Lyons noted that he had not suspended the operations of the Council as alleged by Mr. MacIsaac, but rather had merely suspended "its first regular meeting" in view of the International's knowledge (as a result of the investigation triggered by Mr. MacIsaac's telegram of May 6th) that the Council was not in a position to meet the requirements set forth in the Bylaws for regular Council meetings. In what appears to be a veiled reference to the EPSCA complaint and counsel's preliminary argument with respect to the Council as a party to that complaint, Mr. Lyons also expressed the view that "any actions which may have been taken in [meetings of the Council Executive Board or Business Agents] which require approval through or by a District Council regular meeting or vote are clearly subject to challenge as being unconstitutional".

44. From July of 1981 until December of that year when the trusteeship that gave rise to this complaint was imposed, the Council's operations were financed by the trust fund that was established pursuant to the aforementioned trust document. Payment of various bills was approved at the regular business representatives' meetings at which International representatives Phair and Allen were generally present. After those meetings, the trustees met and took the necessary steps to instruct the administrator of the trust fund to pay the bills which had been approved for payment. Neither Mr. Phair nor Mr. Allen attended any of the trustees' meetings.

45. At the initial meeting of the trustees on July 29, 1981, Mr. MacIsaac was elected chairman of the trustees, with Mr. Harrower as vice-chairman and Mr. Baillie as recording secretary. In addition to the payment of routine expense reimbursements for business representatives, the trustees passed a motion "that the trust fund advance \$20,000 U.S. to Ken Childs re: hospitality expenses at the Convention of the International Union". (It was noted in connection with that motion, that the Western District Council had agreed to cover half of the actual hospitality expenses.) The second meeting of the trustees was held on September 17, 1981. At that meeting, in addition to payment of normal expenses, the trustees, after noting that Local 765 was having financial difficulties which made it very difficult to maintain essential services to its membership, approved a loan to that Local of \$10,000, "to be repaid without interest when the Local is financially secure". As noted by counsel for the respondents, Section 5 of Article V of the Bylaws (quoted above) precludes Council funds from being expended for loans under any circumstances. Thus, the trustees used the trust fund for a purpose that was not permitted by the Council's Bylaws.

46. The third and final meeting of the trustees was held on November 3, 1981. At that meeting bills concerning business agents' meeting expenses were presented, discussed, and approved, as were accounts from Golden, Levinson for legal fees pertaining to several certification applications. Following a discussion concerning legal fees, the trustees "agreed that as a general rule, the [the trust] fund would only be billed for legal costs resulting from Ontario Labour Relations Board Hearings."

47. The decision of the Board (differently constituted) concerning the preliminary submissions of counsel in relation to the EPSCA complaint was issued on September 17, 1981, (after the Board had provided the parties to that complaint with an extensive opportunity to pursue settlement discussions). In that decision (reported at [1981] OLRB Rep. Sept. 1244), the Board wrote, in part, as follows:

"10. With the deletion of Local 700 from the complainants [on the agreement of the parties] it appears to the Board that there is no longer a question that counsel for the complainants has been authorized to act for at least some of the complainants. The question of whether counsel for the complainants has been authorized to represent all of the complainants depends upon various questions of fact and law. Since there has not been any agreement on the facts in dispute, it is necessary for the Board to hear the evidence on the issues in dispute from all of the parties. It appears to the Board that the complainants are relying on the performance of certain alleged conduct as authorizing the making of this complaint and that this alleged conduct is peculiarly within the knowledge of the complainants. In these circumstances, the Board determines that the complainants bear the evidential burden of introducing this evidence before the Board. [The Board's review of the law concerning the evidential burden and 'the legal burden' has been omitted.]

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12. The Board is of the opinion that the views expressed in *A. V. Hallam* [(1973) OLRB Rep. Nov. 599], apply to the instant complaint. The legal burden rests with the International and Norman Wilson to establish what they are alleging, namely, that the complainants do not have the authority or competence to make certain complaints within this proceeding.

13. The Board agrees with the International and Norman Wilson that none of the complainants may make a complaint under section 60 because none of the complainants are employees in a bargaining unit. . . .

15. The matter is referred to the Registrar to be listed for continuation of hearing."

A further decision dated October 27, 1981 was prompted by a request for reconsideration of that decision. In his request, counsel for the complainants asked the Board to deal with the issue of whether a "representative action" could be filed on behalf of employees in the bargaining unit or, in the alternative, to permit employees in the bargaining unit to be added as parties. After noting that the complainants had not made an actual request to amend the style of cause, the Board directed the complainants "to inform the Board and the respondents in writing of the precise terms of the amendments to the style of cause and content of the complaint which they appear to be seeking" and indicated that the parties would be permitted to "make representations on any request with respect to an amendment by the complainants at the commencement of the next hearing". In response to that direction, counsel for the EPSCA complainants requested in a letter dated November 12, 1981 that the style of cause be amended so as to add a large number of individually named complainants.

48. During the fall of 1981, representatives of the parties to the EPSCA case continued their efforts to resolve their differences. Although the Board was not provided with the details of those discussions because counsel (quite properly) were of the view that evidence concerning the particulars of settlement discussions should not be adduced before the Board, it is clear that the parties made extensive efforts to avoid litigation of that complaint. Indeed, it appears that in October or November of 1981, the differences between the International and the EPSCA complainants were thought to be close to being resolved. Unfortunately, those discussions did not result in a settlement of the EPSCA complaint.

49. The aforementioned investigation into the financial affairs of the Council was delayed by a number of factors, including the extensive preparations necessary for the International Convention (that was held in Florida from August 10 to 14, 1981), and a major court case concerning racial discrimination. After the Convention, Mr. Lyons asked General Treasurer Anding about the investigation and was told that Mr. Anding's staff "had been busy and hadn't gotten around to it". Mr. Lyons asked him "to get going", but unfortunately the General Organizer assigned to the matter suffered a fatal heart attack. After further delay, responsibility for the investigation was transferred to Robert Pfister, another General Organizer assigned to the General Treasurer's office.

50. Mr. Pfister commenced his investigation in Toronto on or about November 16, 1981. After meeting with Mr. Wilson, he telephoned Mr. Childs who confirmed that the funds of the Council had not been audited as required by the Bylaws. Mr. Childs also informed him of the existence of the trust fund. When Mr. Pfister subsequently asked Mr. Wilson about the trust fund, Mr. Wilson told him that he was unaware of it. Mr. Wilson then made inquiries of James Harrower, a business representative of Local 700 (the Local Union which had been removed from the style of cause in the EPSCA complaint at the request of Mr. Harrower, because that Local did not wish to be part of those proceedings) and was advised that such a trust did in fact exist. After Mr. Wilson had requested and obtained a copy of the trust document from Mr. Harrower, he telephoned Mr. Pfister and told him that he would forward it to him immediately.

51. Mr. Pfister's "special report" on the Council is contained in the following memorandum dated November 23, 1981 to Mr. Lyons:

"I arrived in Toronto, Canada, on Monday, November 16, 1981, in compliance with your instructions to investigate the financial affairs of the District Council of Ontario, Canada.

In checking the By-Laws of the district council, the source of revenue comes from each outside local union paying Per Capita Tax of \$.10 per month for each member from the outside local unions. While checking the agreements for the Province of Ontario, I found there is a check-off of \$.01 per hour into a District Council fund and effective in May 1981, \$.02 per hour for each employee will be deducted for the District Council fund.

In talking to Kenneth Childs, the Financial Secretary/Treasurer of the district council, he informed me this was not district council money and that the money was put into a trust agreement and can be spent by the Business Agents of the district council. In checking the minutes of the council, I found on several occasions, that money was withdrawn from this fund and put into the fund that the Per Capita Tax money was in. At the present time there is approximately \$200,000 in this trust fund. It appears that this trust fund was established so that this money could be spent by the Business Agents without being affected by the District Council By-Laws. As of this date no audit reports have been received by International Headquarters since the District Council was chartered in 1976.

I have instructed Kenneth Childs to have both the District Council fund and the trust fund audited and he told me he would have the audits by the middle of December 1981. In checking the district council files, there are several communications by the president of the council, George Allen, to Kenneth Childs, to have the funds audited. But this was never done. It seems the only way the District

Council of Ontario can function properly is to be put under International supervision.”

(Neither Mr. Pfister nor Mr. Childs testified before the Board.)

52. Counsel for the complainants argued that Mr. Pfister’s investigation was so superficial as to justify the Board in drawing the inference that it was a foregone conclusion that he would recommend that the Council be placed in trusteeship. However, we do not find that submission to be persuasive. Although Mr. Pfister could have conducted a more extensive investigation, the investigation that he did conduct confirmed the lack of audits and disclosed the existence of the trust fund. Mr. Pfister spoke with Mr. Wilson and with Mr. Childs, who was the Financial Secretary Treasurer of the Council. Given that he was investigating the finances of the Council, Mr. Pfister’s approach appears to have been quite methodical and logical. He also followed up on the information that he received by obtaining a copy of the trust document through Mr. Wilson.

53. Mr. Lyons’ evidence in chief concerning his knowledge of the report was, “I think I first saw that report around Thanksgiving. It was typed at headquarters. I’m sure within a couple of days.” He also testified (in chief), “I could have read [Pfister’s] report before [the December 3rd] meeting but the report doesn’t mention anything about the trust fund, does it?” After being given an opportunity to review the third paragraph of the Pfister report (quoted above), Mr. Lyons acknowledged that it did contain a specific reference to that “trust agreement” and the “trust fund”. He also confirmed in cross-examination that he had seen Mr. Pfister’s report before December 3rd. However, in re-examination he told the Board that although Mr. Pfister’s report had been on his desk for some time, he did not actually read it until the day that counsel (Mr. Minsky) came to Washington to report on the settlement discussions concerning EPSCA. Although Mr. Lyons was unable to recall the date of that meeting, it is clear from the evidence of Mr. Wilson that it was December 3, 1981, when Mr. Lyons met with Mr. Minsky, Mr. Wilson, Mr. Pfister, Mr. Drake, and some other officials of the International in Washington. During the course of that day, they discussed a number of matters including the EPSCA case and settlement efforts concerning that case, Mr. Pfister’s financial investigation concerning the Council, the trust document, and the desirability of placing the Council under trusteeship. On the morning of December 3rd, Mr. Minsky reported on the EPSCA case and the progress of settlement discussions concerning that case. The discussion of the EPSCA case lasted for over an hour, with some interruptions due to Mr. Lyons being called away from time to time to deal with other matters. After lunch there was a discussion of “working assessments” (an unrelated matter), followed by a discussion of the operations of the Council and the Pfister report.

54. Thus, Mr. Lyons ultimately told the Board that it was not until late in the day on December 3rd that he first saw the Pfister report and the trust document. His reaction to the trust document, and in particular to the extremely broad latitude which it gave to the trustees concerning the purposes for which the monies could be used, was one of “outrage”. He testified: “I remember saying to Pfister, what the hell were we doing all day if this is in existence.” He also told the Board:

“Here is a very substantial amount of money under the protection of the Constitution of the International, the Bylaws of the District Council, and the Bylaws of each Local Union. It was the members’ money, money withheld from their pay, taken out of the umbrella of protection of the Constitution and By-laws where it was protected by bonding, the requirement of audits, and charges and trials. . . . It was removed out of that umbrella of protection and placed in a trust fund under the auspices of six individuals, with no protection to the members other than their own potential liability to properly carry out the trust.”

It was also his evidence that “as soon as [he] got to the bottom of page two of the trust document on December 3rd [and read that the trust could be used for ‘financing the activities of the signatory Local Unions in the negotiation and implementation of collective labour agreements and such other activities as the Trustees may from time to time approve’] is when [he] decided to recommend trusteeship to the G.E.B.” He expressed the view that the International would have been susceptible to legal action if it had failed to act to protect the interests of the membership once it became aware of the trust document. In cross-examination Mr. Lyons agreed with counsel for the complainants that the Bylaws of the Council make no provision for the Council Fund. (Indeed he went so far as to speculate: “It may be that they illegally collected it and that it probably should be returned to the membership.”) However, we accept his evidence that at the time the Council was put under trusteeship, he did not know whether the Council had a proper Bylaw to collect the Council Fund, but rather knew only that the business representatives had transferred it to the trust fund. We also accept his evidence that he believed at the time that the fund would not be protected by the Union’s bond coverage. (It is unnecessary for the Board to determine, for the purpose of these proceedings, whether or not that belief was correct.)

55. On December 4, 1981, President Lyons caused the following telegram to be sent to Mr. MacIsaac and to each of the other trustees:

“I have learned this date that you as an officer of your local union in Ontario, Canada and as an individual member of this International Association became a trustee under a Memorandum of Agreement and Declaration of Trust dated July 23, 1981 identifying as trustees six members of this International Association; namely, Lawrence Baillie, Kenneth Childs, James Harrower, Allan MacIsaac, Donald Melvin and Gordon Verdecchia.

Your action together with the action of your five (5) co-trustees is in fact a diversion of funds belonging to the Ontario District Council, International Association of Bridge, Structural and Ornamental Iron Workers, the custody and disposal of which is protected for the benefit of the membership of this International Association by the constitution of this International Association.

You should immediately comply with the following instructions which are first you should notify whoever has been designated to

hold the monies contained in this trust that he is to take no action in dispensing such funds other than in accordance with instructions that I will issue for the return of those funds to the constitutionally established body to which original contributions were made; specifically. The Ontario District Council, International Association of Bridge, Structural and Ornamental Ironworkers. [sic]

Secondly, you should instruct the same parties currently holding these funds to give full cooperation to instructions which will be issued by me as General President of this International Association and be ready to provide all books and records relating to the trust as it now exists and further you should notify Eckler, Brown, Segal Co. Ltd. who heretofore and possible [sic] currently receives and distributes all monies received from collective bargaining contributions designated for the Ontario District Council to anticipate and cooperate with similar instructions.

Finally, you should advise me by return telegram within two (2) working days after receipt of this telegram that you have taken the necessary steps to comply with the instructions issued herein and I call your attention to Article IX, Section 13 found on page 24 of the constitution of this International Association."

(Mr. Lyons also sent a telegram to Eckler, Brown to urge their cooperation and to ascertain the location of the funds covered by the trust document.) Each of the six trustees, including Mr. MacIsaac, sent the following telegraphic response to Mr. Lyons:

"At an emergency meeting of the Business Agents this afternoon, we reviewed the very surprising contents of your December 4th wire. We do not understand the inferences in the wire but, in the interest of the membership are very reluctantly prepared to comply with your instructions. We strongly deny that any improper activity has occurred [sic] and deny specifically that there has been any improper diversion of funds. In fact, the funds referred to are used exclusively for the benefit of the membership in exactly the same manner as they have been used in the past. We point out that we are on the threshold of 1982 provincial wide bargaining for which we are legally accountable to the membership, as the Government designated bargaining agency. Ready access to these funds is essential to prepare for that bargaining on behalf of virtually [sic] all our Ontario members. Any interference can only operate to the detriment of our membership. We note that the trust agreement referred to, executed by officers of the six Ontario Local Unions, provides the International Union and the membership with more legal protection for the funds than has ever existed in the past. We ask that you attend a meeting of Business Agents in Ontario at your earliest convenience in order to explain to us your concerns and the allegations contained in the telegram. In the meantime we have instructed the holder of the funds to freeze same until further notice.

Your unfortunate reference to possible suspension under the Constitution has caused considerable alarm in Ontario not only among the Business Agents, but among those members in Ontario presently apprised of the situation. This reply is forwarded to you without the approval of the membership of the six Local Unions, and your telegram will be placed before the members at the next scheduled monthly general meetings for their consideration and possible action."

56. On December 10, 1982 at an afternoon G.E.B. meeting called for the purpose of considering the operations and activities of the Council, Mr. Lyons reviewed the results of the International's investigation. (December 10th was the earliest date following December 3rd on which the members of the G.E.B. were available for a meeting.) After discussing the matter at some length, the G.E.B. decided to place the Council under International supervision and control effective Monday December 14, 1981. In reaching that decision, the G.E.B. considered Mr. Pfister's report, the trust document, and information provided by Mr. Lyons concerning the other irregularities in the operation of the Council. (It is unclear from the evidence whether the G.E.B. was made aware that the business representatives had agreed to effectively freeze the monies in the trust fund. However, despite Mr. Hayes' able argument to the contrary, we are of the view that nothing turns on whether or not they had that information before them.

57. Following its decision to impose trusteeship, the G.E.B. caused the following letter dated December 10, 1981 to be forwarded to the officers of the Council and the President of each Local Union affiliated with the Council, with instructions that it be read to the membership of each Local:

"This is to advise that the General Executive Board of this International Association has received a report concerning the investigation of activities and operations of the Ontario District Council, International Association of Bridge, Structural and Ornamental Iron Workers, Ontario, Canada.

After a prolonged discussion of all of the above, the General Executive Board found that:

1. The District Council of Ontario has failed to comply with Articles III, IV, V, VI and VII of its Constitution and By-Laws.
2. The officers and in particular the Financial Secretary-Treasurer of the District Council have acted irresponsibly and failed to discharge their duties as prescribed in the applicable sections of the Constitution and By-Laws of the Ontario District Council.
3. Funds belonging to the Ontario District Council have been held contrary to the District Council's Constitution and By-Laws including more recently improperly diverted from the

Council by the Memorandum of Agreement and Declaration of Trust dated July 23, 1981 between International Association of Bridge, Structural and Ornamental Ironworkers Local Unions 700, 721, 736, 759, 765 and 786 of the First Part and L. Baillie, K. Childs, J. Harrower, A. MacIsaac, D. Melvin, and G. Verdicchia [sic] of the Second Part.

4. The Ontario District Council as currently constituted and operated has placed in jeopardy its responsibilities and duties as the designated bargaining agent in a legal manner.

The General Executive Board, after careful consideration and deliberation, and in order to:

1. Protect the interest of the Ontario District Council and the membership of the affiliated local unions which comprise said Ontario District Council,
2. Assure that the Ontario District Council will comply with the provisions of its Constitution and By-Laws,
3. Correct the financial malpractice of the Ontario District Council,
4. Assure the performance of the Ontario District Council as a bargaining agent,
5. Restore democratic procedures in the Ontario District Council,
6. Otherwise carry out the legitimate interest of the Ontario District Council and this International Association,

unanimously decided, pursuant to and in accordance with the provisions of Article XII, Section 7 of the International Constitution, to place the Ontario District Council, International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO, under International supervision and control effective as of Monday, December 14, 1981. The General Executive Board further decided that beginning as of such date and until further notice, the following shall prevail:

1. All offices of the Ontario District Council shall be and are hereby declared vacant.
2. All business and affairs of the Ontario District Council shall be administered by James Phair, who is hereby designated as Administrator of the Ontario District Council.

3. All officers of the Ontario District Council are hereby instructed to surrender and deliver immediately upon being notified by this letter dated December 10, 1981 to the above-named Administrator, all funds, assets, property, records and other documents they have in their possession belonging to said Ontario District Council. James Phair, in his capacity as Administrator, is authorized to obtain the possession of the aforementioned. All of the aforementioned shall remain the property of the Ontario District Council and shall be administered by the named Administrator in accordance with the applicable provisions of the International Constitution and for the benefit and protection of the members of the affiliated local unions of said Ontario District Council.

The imposition of trusteeship by the International Association at this time pursuant to Article XII, Section 7 of the International Constitution is an emergency measure and the General Executive Board within forty-five (45) days after the completion of an audit of the Ontario District Council will hold or cause to be held a full and fair hearing to determine the propriety of its action in placing the Ontario District Council under International supervision, notice of which hearing will be given to you."

(That letter parallels the findings, purposes, and decision set forth in the Minutes of the December 10th meeting of the G.E.B.)

58. By letter dated December 14, 1981, the Registrar of the Board forwarded Notice of Continuation of Hearing with respect to the EPSCA complaint, which was scheduled to be heard on Tuesday February 9th, Wednesday February 10th, and Friday February 26th, 1982. (Those hearings were subsequently cancelled by the Board to permit the instant complaint to be dealt with prior to the EPSCA complaint.) As contended by counsel for the complainant, the scheduling of that matter for continuation of hearing reflects the fact that settlement discussions among the parties had not met with success.

59. In support of their complaint, the complainants also drew the Board's attention to the following letter dated January 5, 1982 which Mr. Phair, in his capacity as Administrator of the Council, caused to be delivered to Golden, Levinson, counsel for the complainants in these proceedings and in the EPSCA complaints, on or about that day:

"As you know, I was appointed by the General Executive Board ('the G.E.B.') of the International Association of Bridge, Structural and Ornamental Iron Workers, which was placed under International supervision effective December 14, 1981. I understand that you are purporting to act on behalf of or in the name of the District Council in certain proceedings before the Ontario Labour Relations Board.

By letter dated December 10, 1981, the G.E.B. informed the officers of the District Council and its affiliated Local Unions of the District Council of such International supervision and of my appointment as Administrator. The G.E.B. specifically instructed the District Council's officers, including Mr. Donald Melvin, its Recording Secretary, to surrender and immediately deliver to me all funds, assets, property, records and other documents which they might have in their possession belonging to the District Council. I repeated this request to Mr. Melvin in telegrams which I sent to him on December 21 and December 23, 1981 and requested his compliance by December 30, 1981. As of this date, Mr. Melvin has still not complied with my request but rather, by telegram dated December 24, 1981, informed me that he could not obtain the release from your office of documents belonging to the District Council despite his apparent attempt to do so.

In addition, by my letter dated December 23, 1981 to Mr. Melvin, I requested that he provide me with information concerning any legal proceedings in which the District Council might be involved and as well, the name or names of the law firms purporting to act on behalf or in the name of the District Council.

I therefore request that you release and remit to me by no later than January 7, 1982, all documents in your possession which are the property of the District Council and to advise me by that date of any legal proceedings in which your law firm may be purporting to act for or in the name of the District Council, including the nature of such cases and the District Council's interest in same.

I am of course aware of the Complaint dated February 3, 1981, under Section 79 of *The Labour Relations Act* (Board File No.: 2367-80-U) and of the fact that application was made at the commencement of the hearing before the Board on behalf of the International Association of Bridge, Structural and Ornamental Iron Workers and Mr. Wilson to strike out the names of the District Council and the Rodmen Employee Bargaining Agency from the list of complainants in the style of cause. Since, in my view, the District Council and the Rodmen Employee Bargaining Agency never properly retained your firm in such Complaint and since, in any event, I do not wish the District Council to be involved in these proceedings either as a complainant or as part of the Rodmen Employee Bargaining Agency, I request that you cease to act on behalf of the District Council in this regard. Further, I request that you immediately ask the Board to remove the names of the District Council and the Rodmen Employee Bargaining Agency from the style of cause in these proceedings."

(The parties advised the Board that they had satisfactorily resolved the matter of custody of documents.) Mr. Phair told the Board that the main object of that letter was

“to get the Council’s name off any and all actions pertaining to the International”. He also expressed the view that the Council was “set up as a co-ordinating body to co-ordinate activities and problems between the Locals and the International; it was not set up to sue the International”. During cross-examination he emphasized that view by stating, “I don’t believe it (the Council) was set up to kick the International in the teeth.”

60. Before further considering the factual context in which this case arose and the inferences which can properly be drawn concerning the reasons why the Council was placed under trusteeship, the Board will consider the labour law principles to be applied in this matter.

61. “Trusteeships” are dealt with as follows in section 82 of the Act:

“(1) A provincial, national or international trade union that assumes supervision or control over a subordinate trade union, whereby the autonomy of such subordinate trade union, under the constitution or by-laws of the provincial, national or international trade union is suspended, shall, within sixty days after it has assumed supervision or control over the subordinate trade union, file with the Board a statement in the prescribed form, verified by the affidavit of its principal officers, setting out the terms under which supervision or control is to be exercised and it shall, upon the direction of the Board, file such additional information concerning such supervision and control as the Minister may from time to time require.

(2) Where a provincial, national or international trade union has assumed supervision or control over a subordinate trade union, such supervision or control shall not continue for more than twelve months from the date of such assumption, but such supervision or control may be continued for a further period of twelve months with the consent of the Board.”

As noted by counsel for the respondents, section 82 imposes no impediments or constraints on an international union which places a subordinate union under trusteeship, other than the requirement of filing certain information with the Board. As observed by the Board in *Operative Plasterers’ and Cement Masons’ International Association of the U.S.A. and Canada*, [1978] OLRB Rep. March 23, at paragraphs 10 and 11:

“10. ... This lack of impediments or constraints would appear to reflect a recognition on the part of the Legislature that most trusteeships are imposed as a result of real and legitimate concerns on the part of the union involved. For example, a trusteeship may be imposed because of mismanagement or dishonest use of local funds, because a local has become so torn by dissent that it cannot function properly, or perhaps to remove officers who have either become dictatorial or who have failed to administer the local in a responsible manner. At times, particularly with small locals, a trusteeship may

be imposed simply because none of the members of the local are willing to assume the responsibilities of elected office.

11. The Legislation recognizes that trusteeships generally have a legitimate purpose, but also places restrictions on their duration. Trusteeship is inevitably accompanied by a restriction on the ability of the local's membership to participate in the government of the local or to have a say in the policies adopted by the local will [be] the likelihood that the policies and practices adopted by the local will not be reflective of the wishes of the local's membership."

62. Counsel for the respondents argued that reading subsections (1) and (2) of section 82 together makes it clear that the Board has no power at all to inquire into the validity of the first year of operation of a trusteeship. He contended that the Board's jurisdiction is triggered only if and when the parent body wishes to prolong the trusteeship beyond its first twelve months. Although it is clear that under section 82 an international union does not need the Board's consent to impose a trusteeship on a subordinate union for a period of up to twelve months, there is nothing in section 82 which in any way precludes the Board from exercising its broad remedial powers under section 89(4) to direct such union to cease supervision or control over the subordinate body, or to modify its supervision or control in such manner as directed by the Board in order to rectify the act or acts complained of, if the Board is satisfied that the imposition or continuation of the trusteeship constitutes an unfair labour practice in violation of a substantive provision of the Act, such as section 70 or 80(2). Section 82(1) of the Act merely stipulates a requirement (namely, the filing of certain documents within sixty days) which must be met with respect to all trusteeships, regardless of the purpose for which they are imposed. If that requirement is not satisfied, a violation of the Act will clearly have occurred. However, compliance with that requirement by the International does not preclude a finding that the Act has otherwise been violated by imposing or continuing the trusteeship. Furthermore, the fact that section 82(2) gives the Board plenary jurisdiction concerning the continuance of a trusteeship beyond its first twelve months of operation does not prevent the Board from determining, in a section 89 complaint, whether or not the initial imposition of a trusteeship, or its continuance for a period of up to twelve months, was itself an unfair labour practice. The Board's jurisprudence is replete with examples of actions which may be either lawful or unlawful, depending upon the motivation of the actor. For example, section 77 provides that nothing in the Act "prohibits any suspension or discontinuance for cause of an employer's operations". Nevertheless, in *Academy of Medicine*, [1977] OLRB Rep. Dec. 783, the Board found contraventions of sections 64, 66, and 70 of the Act where the closure of the employer's Call Answering Service Division "was motivated in whole, or in substantial part by anti-union considerations." (See also *DeVilbiss (Canada) Limited*, [1976] OLRB Rep. Mar. 49, at paragraph 17, and *Westroc Industries Limited*, [1981] OLRB Rep. Mar. 381, at paragraph 24.) Thus, we are of the view that nothing in section 82 of the Act precludes the Board from determining under section 89 whether the imposition of the impugned trusteeship contravened section 70 or section 80(2) as alleged by the complainants.

63. Counsel for the respondents argued that the complainants have no status to bring this complaint since a breach of sections 70 and 80(2) can only be committed against a "person", not a "trade union" or "council of trade unions". In support of that

contention, he noted that by virtue of the Board's finding in *Zimmcors Company*, [1978] OLRB Rep. Nov. 1056, the Council is "a certified council of trade unions" and, therefore, is a "trade union" within the meaning of section 1(1)(p) of the Act. Thus, he submitted that neither the Council nor the complainant Locals are within the ambit of protection provided by sections 70 and 80(2) since none of them is a "person" within the meaning of those provisions. He further contended that the individual complainants have no status to maintain this complaint because the trusteeship was imposed on the Council (which, as a certified Council, could not be the victim of an alleged breach of sections 70 and 80(2) since it is not a "person"). Thus, it was his position that even if the imposition of the trusteeship can be construed to be "intimidation or coercion" within the meaning of section 70, or a "penalty" within the meaning of section 80(2), it is the Council that has been penalized, not the individual complainants. Accordingly, he submitted that the complaint must be dismissed because the Council is not (and could not be) a complainant in respect of a violation of those provisions, and because the complainants who are before the Board in this matter have no status to complain on behalf of the Council.

64. In response to those submissions, counsel for the complainants contended that although the Council may be a victim without a protected right under sections 70 and 80(2), the individuals whom the International intended to intimidate, coerce, or penalize through the imposition of a trusteeship on the Council do have status to complain since each of them is a "person" within the meaning of those sections. He further submitted that the people affected by the trusteeship are the members of the complainant Locals, and the individual complainants who, as the respective Locals' business agents, are entitled under the Bylaws to represent the Locals at meetings of business agents of the Council, and who, with the acquiescence of officials of the International, have carried out the effective management and control of the Council since its inception.

65. As contended by counsel for the respondents, sections 70 and 80(2), and a number of other sections of the Act (including sections 67(2), 89(4), 96(1), and 135(1), clearly distinguish between "person" and "trade union" (see, for example, *Woodall Construction Company Limited*, [1979] OLRB Rep. June 597; *DeVilbiss (Canada) Limited*, [1976] OLRB Rep. March 49; and *Rapid Typesetting Company Limited*, [1969] OLRB Rep. Oct. 875). Although the complaint Locals have status to pursue a section 89 complaint on behalf of members who are victims of an unfair labour practice, we are of the view that there is considerable merit in Mr. Minsky's contention that imposition of the trusteeship on the Council does not have a sufficiently direct effect on the rank and file members on whose behalf the Locals purport to bring this complaint, to make those members "victims" of the trusteeship which is alleged to constitute intimidation, coercion, or the imposition of a penalty on them. However, if imposition of the trusteeship on the Council can be said to be too remote from the individual rank and file members of the Locals to raise any question of intimidation, coercion, or penalizing of them by means of placing the Council under trusteeship, the same is not true of the individually named business representatives. The evidence clearly establishes that since the inception of the Council in 1976, its effective management and control has been carried out through regular meetings of those business representatives whose power to conduct at least some of the affairs of the Council is evident from the Bylaws. Section 14 of Article XXI of the Constitution provides that when a subordinate body of the International is placed under International supervision, all offices of the subordinate

body "shall automatically become vacant". That this was the effect of the impugned trusteeship on the complainant business representatives is evident from the G.E.B.'s letter dated December 10, 1981 and from the evidence concerning the subsequent operations of the Council under the supervision of Mr. Phair. Thus, the imposition of supervision by the International had a very tangible and direct effect on the complainant business representatives, since it was intended to, and did in fact deprive them of their positions on the Council and prevent them from continuing to administer affairs of the Council as representatives of the Locals. Accordingly, we find that the individually named complainants have status to maintain the complaint on their own behalf as "persons" who could be (intentionally) intimidated, coerced, or penalized by the imposition of the trusteeship on the Council. Therefore, the respondents' submission that none of the complainants have status to bring this complaint cannot be accepted.

66. If the Board is satisfied that the respondents or any of them placed the Council under trusteeship for purposes which included penalizing the complainant business agents because they filed the EPSCA complaint, or were about to participate in it, our remedial authority under section 89(4) would empower us to direct the respondents to remedy the situation by removing or modifying the trusteeship. Such remedy would be directed to the complainant business representatives and their pursuit of the EPSCA complaint, and would only incidentally benefit the Council which is beyond the purview of sections 70 and 80(2). In applying a somewhat analogous approach in the case of a member of management discharged for her involvement in a union organizational drive, the Board wrote as follows in *A.A.S. Telecommunications Ltd. and Zipall Ltd.*, [1976] OLRB Rep. Dec. 751:

"34. Our finding that the conduct of the respondents, including the dismissal of Bird, constituted a violation of section 56 [now section 64] brings us to the question of the appropriate way to remedy the violation. The complainant argued that the wrong to the union was best redressed by reinstating Bird in the position that she held prior to her dismissal. An important question, however, is whether a remedy that indirectly benefits a managerial employee is in conflict with the recognized principle that a managerial employee has no protectable right to join a trade union.

35. It is clear to us that, if Bird is a managerial employee, she would not be entitled in her own right to relief under either section 58 [now section 66] or 61 [now section 70]. The relief in this case, however, is sought by the complainant, not on behalf of an individual, but on behalf of itself. The remedy granted, therefore, must be a remedy that, in the circumstances, is appropriate for the union. This is not to say that relief that benefits an individual is not appropriate where a union is seeking relief on its own behalf, but only that it must be shown to be appropriate before it will be granted. Once it is established that such relief is appropriate for a union, however, then there would appear to be no direct conflict with the statutory exclusion of managerial employees. The remedial protection is directed to the union, and not to the individual managerial employee who benefits only incidentally. The individual

managerial employee, therefore, is still given no guarantee of protection.

36. The lack of any guaranteed protection for the managerial employee does not flow only from the requirement that the remedy be appropriate to the circumstances of the case. The fact is that the right being asserted belongs to the union. The complaint must be brought by the union, and cannot be asserted by the managerial employee alone. The union, if it brings the complaint, must establish that the acts in respect of the managerial employee resulted in the kind of interference prohibited by section 56. The causal relationship between the dismissal and the adverse consequences for the union must be clearly established. The reverse burden of proof, moreover, would not assist the union in establishing its case, since the essence of the complaint is conduct directed at a trade union rather than at a person. All of these considerations make it clear that, even if a remedy for the violation of section 56 may benefit indirectly a managerial employee, the availability of this remedy does not provide the managerial employee with anything resembling a guaranteed protection.

37. Our conclusion is that a union remedy may benefit indirectly a managerial employee and yet not be in conflict with the general principle that a managerial employee has no protectable right to join a union. Provided that a union can establish that the relief it requests is appropriate in the circumstances, then that relief must be regarded as a remedy for the union, and not as a remedy for the individual managerial employee..."

Similarly, if the complainant business representatives can establish that the relief they request in relation to the trusteeship is appropriate as a remedy against a wrong which they have suffered contrary to the Act, the fact that the Council might also incidentally benefit from such remedy would not dissuade the Board from granting such relief to them.

67. Counsel for the complainants readily conceded that the "reverse onus" imposed by section 89(5) of the Act has no application in the circumstances of this case. Thus, the complainants have the burden of proving their case on the balance of probabilities. However, counsel submitted that in determining what the complainants must prove concerning the respondents' motivation for imposing the "penalty" of trusteeship, the Board should apply the "taint" theory which it has traditionally applied in the context of employer unfair labour practices, including section 89 complaints in which it is alleged that an employer or person acting on behalf of an employer has contravened section 80 of the Act. (See *Westinghouse Canada Limited*, [1980] OLRB Rep. April 577, at paragraphs 44 to 57, for a thorough discussion of the legal and policy considerations which underlie that approach.) Counsel for the respondents, on the other hand, argued that the taint theory should not be applied in a case alleging a breach of section 80 by a union or person acting on behalf of a union. In support of that position, he submitted that the taint theory finds its justification in the "reverse onus" provisions

of section 89(5). However, we agree with counsel for the complainants that the taint theory is conceptually quite distinct from the matter of burden of proof (or "onus" as it is sometimes rather loosely described). The legal burden of proof is "the obligation of a party to meet the requirement of a rule of law that a fact in issue be proved [or disproved] either by a preponderance of evidence or beyond reasonable doubt as the case may be" (see *I.C.B. Warehousing Division of Alar-Anson*, [1976] OLRB Rep. Oct. 621, at paragraph 8). Thus, it determines which party has the burden of establishing the essential elements of the case. The taint theory, on the other hand, defines one of those elements, namely, what the party who bears the legal burden must prove in order to establish the requisite motivation. The distinctness of these concepts is confirmed by the fact that the Board applied the taint theory long before the enactment in 1975 of what is now section 89(5). (For a review of the Board's jurisprudence, see *Delhi Metal Products Ltd.*, [1974] OLRB Rep. July 450, at paragraphs 14 and 15.)

68. Under the "taint" theory, if any of the reasons for the discharge, lay-off, or other penalization of an employee by an employer was the fact that he was a member of a union or was exercising any other rights under the Act, the employer's action will be found to be a contravention of the Act. Similarly, in the context of section 80(1), if any of the reasons for an employer's imposition of a pecuniary or other penalty on a person is the fact that the person has made an application or filed a complaint under the Act, or has participated in or is about to participate in a proceeding under the Act, the employer will be found to have contravened the Act, notwithstanding the co-existence of a "bona fide" reason (or reasons) for the imposition of that penalty.

69. Neither the arguments of counsel nor the Board's own research disclosed any Canadian jurisprudence with respect to the applicability of the taint theory in the context of penalization of a complainant by the imposition of a trusteeship. In the different but somewhat related context of direct challenges to the validity of trusteeships, the Courts in the United States have generally ruled that a trusteeship is valid and will not be dissolved if the parent body can show that at least one of the reasons for the imposition of a trusteeship was a valid purpose within section 302 of the *Landrum-Griffin Act* of 1959, which provides:

"Trusteeships shall be established and administered by a labor organization over a subordinate body only in accordance with the constitution and bylaws of the organization which has assumed trusteeship over the subordinate body and for the purpose of correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of such labor organization."

However, that approach, which is in diametric opposition to the taint theory, appears to be based upon section 304(c) of that Act which provides (in part) that a trusteeship established by a labour organization in conformity with its constitution and authorized or ratified after a fair hearing "shall be presumed valid for a period of eighteen months from the date of its establishment and shall not be subject to attack during such period except upon clear and convincing proof that the trusteeship was not established or maintained in good faith for a purpose allowable under section 302." In the absence of a

similar legislative provision, or compelling policy reasons for adopting so restrictive an approach in the context of the important task of protecting persons who seek to vindicate their rights through proceedings before this Board, we are not disposed to adopt such an approach in this context.

70. The statutory language contained in the *Labour Relations Act* supports the application of the taint theory not only in relation to alleged employer unfair labour practices under provisions such as sections 66 and 80(1), but also in the context of alleged union unfair labour practices under the provisions such as section 80(2).

“No employer, employers’ organization or person acting on behalf or an employer or an employers’ organization,

(a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment *because* the person was or is a member of a trade union or was or is exercising any other rights under this Act”.

(emphasis added)

Similarly, section 80 provides:

“(1) No employer, employers’ organization or person acting on behalf of an employer or employers’ organization shall,

(a) refuse to employ or continue to employ a person;

(b) threaten dismissal or otherwise threaten a person;

(c) discriminate against a person in regard to employment or a term or condition of employment; or

(d) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of a belief that he may testify in a proceeding under this Act or *because* he has made or is about to make a disclosure that may be required of him in a proceeding under this Act or *because* he has made an application or filed a complaint under this Act or *because* he has participated or is about to participate in a proceeding under this Act.

(2) No trade union, council of trade unions or person acting on behalf of a trade union or council of trade unions shall,

(a) discriminate against a person in regard to employment or a term or condition of employment; or

(b) intimidate or coerce or impose a pecuniary or other penalty on a person, *because* of a belief that he may testify in a proceeding under this Act or *because* he has made or is about to make a disclosure that may be required of him in a proceeding under this Act or *because* he has made an application or filed a complaint under this Act or *because* he has participated or is about to participate in a proceeding under this Act."

(emphasis added)

The use of the word "because" in this context is quite significant. To paraphrase the judgment of Hughes J. in *R. v. Bushnell Communications et al.* (1973), 45 D.L.R. (3d) 218 (in which the Ontario High Court was dealing with the provision of the *Canada Labour Code* substantially similar to section 66 of the *Labour Relations Act*, in considering an enactment such as section 80(2) which is devoid of the words "sole reason" or "for the reason only" and resting only on the word "because", the Board may legitimately take an expanded view of its application. If the evidence satisfies it that the fact that the penalized person (or persons) filed a complaint under the Act, or participated in or was about to participate in a proceeding under the Act, was present in the mind of the union, or person(s) acting on behalf of the union, as a motivating factor in reaching the decision to impose a pecuniary or other penalty on that person, either as a main reason or one incidental to it, or as one of many reasons regardless of priority, section 80(2) of the Act has been transgressed. The decision of the High Court was upheld "in substance" on appeal by the Ontario Court of Appeal (47 D.L.R. (3d) 668). In delivering the judgment of the Court, Evans J.A. indicated that if the proscribed motivation was a "proximate cause" of the impugned action, there would be a contravention of the provision in question even though other proximate causes were also present.

71. There are sound labour relations policy reasons for applying the taint theory in determining whether section 80(2) has been breached. As in the case of dismissals from employment or imposition of pecuniary or other penalties by an employer, the reasons for the imposition of a "pecuniary or other penalty" by a union, or persons acting on behalf of a union, are generally known only by the union officials who decide to impose it. Furthermore, as in the case of employer actions, there exists the distinct possibility that "legitimate" reasons for imposing a "pecuniary or other penalty" such as a trusteeship will co-exist with "illegitimate reasons" and will present the Board with the perplexing and rather artificial task of attempting to determine which of those constituted the "true" or "predominant" motivation for the impugned action, unless the taint theory is applied. Moreover, unimpeded access to the Board's processes through freedom to file and pursue complaints without fear of recrimination by an employer, union, or person acting on behalf of an employer or union, is essential to the preservation of the rights and freedoms enshrined in the Act, and is also essential to the effective administration of the Act by this Board. As stated by the Board in *United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46*, [1974] OLRB Rep. Aug. 569, at paragraph 10:

"The legislature under section 71(2) [now section 80(2)] of the Act has attempted to remove any impediments to parties utilizing this

Board for the purposes contained within *The Labour Relations Act*. It is the intent that there be complete freedom for persons who wish to avail themselves of the benefits and remedies contained in *The Labour Relations Act*.”

See also paragraph 13 of that case in which the Board wrote:

“If employees are made to fear some form of retaliation for exercising their rights under this Act, either by the trade unions or by the employers, then the purposes of the Act will not be accomplished.

72. For the foregoing reasons, we do not interpret section 80(2) as permitting a union or person acting on behalf of a union to impose a penalty on a person even in part because he has filed a complaint under the *Labour Relations Act* or because he is about to participate in a proceeding under the Act. To adopt the “predominant motive” or “true motive” approach advocated by counsel for the respondents would weaken the protections afforded to complainants under the Act, and would create an indefensible distinction between the Board’s treatment of employers and unions in the context of section 80. Accordingly, we are of the view that although the co-existence of lawful motivation for imposing such penalty can be taken into account in an appropriate case in determining a suitable remedial response by the Board to a violation of the Act (see, for example, *Westinghouse Canada Limited*, *supra*, and *FAG Bearings Limited*, [1978] OLRB Rep. Jan. 76), the co-existence of such motivation along with motivation proscribed by section 80 does not preclude the Board from finding a contravention of that provision in proceedings under section 89, be it by an employer, a union, or a person acting on behalf of an employer or a union.

73. Having regard to that legal framework, the Board must now consider whether the complainants have established a breach of section 70 or 80(2) of the Act.

74. Counsel for the complainants argued that the International must have been aware of the defects in the operation of the Council long before June of 1981. Accordingly, he asked us to infer that the complainant business representatives’ involvement in the EPSCA complaint, and not those defects, prompted the International to penalize those complainants by imposing a trusteeship on the Council. Although the International had the means of knowing about the lack of full Council meetings, election of delegates, and election of officers, through documents such as minutes, ballots, and correspondence on file at its Washington headquarters, we accept Mr. Lyons’ evidence that in the absence of a specific question or concern about the operation of the Council, such documents are merely filed along with the multitude of others routinely sent to headquarters by local unions and district councils throughout North America. It was also his uncontradicted evidence that the position of delegate to a district council can be combined with another office. Thus, even if a clerk at headquarters had noted the absence of Council delegates on the ballots submitted by the Ontario Local Unions, the clerk might well have assumed that those positions were combined with other offices since clerks do not “check the ballots against the Bylaws”. We also accept Mr. Lyons’ credible evidence that when local officers or business representatives write to headquarters to ask a question, such as the question posed to Mr. Drake by Mr. Melvin in his letter of January 25, 1978 concerning when nomination

and election of Council officers should take place in view of the change in frequency of International Conventions, they are given an answer but the International does not generally "follow up" on such matters to determine whether the advice from headquarters has been followed, as it is assumed to have been implemented when nothing further is heard to be contrary.

75. Counsel further contended that the International must have been advised of the irregularities by Mr. Allen, Mr. Wilson, or Mr. Phair. (Although testimony from Mr. Allen might have assisted the Board in reaching its decision concerning this complaint, the parties were in agreement that Mr. Allen was unable to give evidence due to serious health problems, and that under the circumstances the Board should proceed to dispose of this matter on the basis of the available evidence.) As a District Representative appointed by the International, Mr. Allen submitted a weekly report of his activities to headquarters, with a copy to Mr. Wilson, whose office was located in the same suite of offices as Mr. Allen's. He was the International representative assigned by Mr. Wilson to negotiate and service collective agreements with Ontario Hydro (and EPSCA). In early December of 1981, Mr. Allen resigned as President of the Council following several months of increasingly debilitating illness. Prior to that, Mr. Phair had replaced him as the International official responsible for servicing the EPSCA agreements. Mr. Phair was also responsible for servicing three of the Ontario Locals involved in the Council. Accordingly, he began attending Council meetings in September of 1980, but his presence was not well received by the business representatives. They felt that he should not be entitled to vote but rather should merely be present as a "guest". Thus, it took many months for him to establish, with the assistance of a letter from headquarters, his right to fully participate in Council proceedings. Although Mr. Phair was present when the "financial committee" was established, he was unaware of the establishment of the trust fund to which the Council Fund was transferred. His primary interest appears to have been other matters such as jurisdictional disputes.

76. It is unnecessary to determine the precise point at which Mr. Wilson and Mr. Phair became aware of the failure to hold full Council meetings, to elect delegates, to elect officers, and to carry out audits, because we are satisfied that they did not in any event relay any such information to anyone at the International's headquarters prior to the investigation prompted by Mr. MacIsaac's telegram. Moreover, Mr. Allen's knowledge of those failures to comply with the Bylaws of the Council was also not conveyed to Mr. Lyons or to anyone else in Washington (with the exception of Mr. Drake, to whom Mr. Allen wrote to obtain guidance concerning the proper procedure for election of Council officers). This is not surprising in view of the fact that, as noted by Mr. MacIsaac and Mr. Lyons, Mr. Allen was at least partly responsible for many of the Council's deficiencies and, accordingly, would not likely have been anxious to draw attention to them.

77. Mr. MacIsaac testified that "Phair and Allen are not stupid people" and that "they certainly knew what was going on" in relation to the trust fund. While it may be reasonable to infer that Mr. Allen was aware of the trust document, there is no direct evidence or circumstances from which it can reasonably be inferred that he informed Mr. Lyons, or any other official of the International, of its existence. Moreover, we accept the credible evidence of Mr. Phair that, as a relatively new member of the Council who had great difficulty in convincing the business representatives that he was

entitled to vote at such meetings, and who had no particular interest in the finances of the Council, he was unaware of the trust document and the related financial transactions prior to Mr. Pfister's investigation. Following a heated discussion of the EPSCA situation at a business representatives meeting of the Council on November 20, 1980, Mr. Phair did hear Mr. MacIsaac say that "they [the business representatives] ought to put the Council's money in a different account because if the International could come in and sign collective agreements over their heads, there would be nothing to stop them [the International officials] from coming in and taking the Council's money". Mr. Phair interpreted that comment as "a shot at [him] because [he] represented the International", and "reported it to the International". However, he was unaware that the business representatives acted on that statement by executing a trust document.

78. We are also satisfied that Mr. Wilson was unaware of the existence of the trust fund as he did not have any specific assignment to or relationship with the District Council, apart from briefly attending some meetings to report on particular matters of interest to the business representatives, such as negotiations and legislative developments. Moreover, we are satisfied that Mr. Lyons and the other members of the G.E.B. were unaware of the existence of the trust document and the trust fund to which it related, until such time as it was revealed to them as a result of Mr. Pfister's financial investigation.

79. Mr. Lyons testified that the International very rarely imposes trusteeship for "punitive reasons" (i.e., "to correct improper practices", as opposed to situations in which a local is placed under trusteeship because of lack of officers or financial resources). He estimated that in "twenty some odd years it's been less than fifteen times" that the International has imposed trusteeship for "punitive reasons". He also testified that "it's a very careful step-by-step process" which the G.E.B. is very loath to implement unless it is the only step left. The impugned trusteeship is the first "punitive" trusteeship which has ever been imposed on a district council during Mr. Lyons' tenure as General President.

80. Although Mr. Lyons described the lack of Council meetings and the failure to elect delegates and officers as "pretty incredible", he candidly told the Board that those matters, by themselves, would not warrant imposition of trusteeship. He also testified (in chief) that the lack of audits was "very significant" since it could jeopardize the blanket bond which covers all local union and district council officers. However, in cross-examination he sought to justify the International's failure to take earlier steps to remedy the lack of audits by stating that "an audit for a district council isn't the most important thing in the world" because "almost all of the district councils have very little money". On the whole, Mr. Lyons' evidence concerning the significance of the lack of audits was rather equivocal and somewhat contradictory. However, it appears from his evidence as a whole that trusteeship would not have been the International's reaction to a lack of audits, since that deficiency could have been corrected by less drastic action, such as a "letter of instructions" from President, or the temporary provision by the International of assistance from an experienced financial secretary.

81. Mr. Lyons testified that "the major by far cause" of the trusteeship was the "diversion of Council funds" into the trust document, but that once the G.E.B. "decided [they] had to act because of the knowledge of the diversion of funds, all of these

improper actions were included so as to cover everything and make sure everything was cleared up.” He conceded that there was nothing to indicate that the Council funds had actually been used improperly and that he had no reason to believe that the six business representatives who signed the trust document were anything but honest men who may have made mistakes; however, he also expressed concern that the funds could be used improperly because of the aforementioned lack of protection.

82. Mr. Lyons agreed in cross-examination that by December 9, 1981 he knew from the trustees’ response to his telegram of December 4th that the funds in question were secure. When asked why he nevertheless followed through on his decision to recommend trusteeship, he stated that although the International knew where the money was and knew that it was frozen as a result of those telegrams, it still had to do something to “clean up” the situation and “untangle the problems” the Council was having. He also expressed the opinion that trusteeship was “the nicest and cheapest way to go” and the “simplest, most efficient way to clean it up”. He explained that although the matter might have been dealt with by filing charges against the business representatives under the Constitution, trials and appeals of such charges can take a very lengthy period of time and trusteeship stops all meetings and transactions, and allows the International to come in and correct the situation without specifically accusing anyone of wrongdoing where “as a group” a subordinate body is “going in a wrong direction”.

83. Although Mr. Lyons dismissed as “totally ridiculous” the complainants’ allegation that the trusteeship was imposed because of the EPSCA complaint, he conceded that he disagrees with the concept of a member or subordinate body launching proceedings against the International. He also expressed the view that the EPSCA complaint “was on hold” at the time the trusteeship was imposed and testified (near the conclusion of this lengthy examination in chief) that “absolutely nothing” was happening concerning the EPSCA case in October, November, and December of 1981. However, that statement was contradicted by the evidence of other witnesses and by Mr. Lyons’ own subsequent evidence. The Board issued two interim decisions concerning EPSCA during that period and counsel sought to amend the complaint so as to add hundreds of additional complainants. Moreover, settlement discussions were occurring with a view to resolving that complaint.

84. Our careful review of all the evidence in this matter convinces us that officials of the International, including Mr. Lyons and Mr. Wilson, found the EPSCA complaint to be of substantially greater importance than they were willing to concede in their evidence before the Board. Thus, we are unable to give credence to Mr. Wilson’s testimony that he viewed the EPSCA complaint as a “nuisance” action, or to the evidence of Mr. Lyons that he “didn’t really give great value to the on-going [EPSCA] litigation” because “it wasn’t that important to [him]”. The considerable importance which Mr. Lyons in fact attached to the EPSCA situation is evident from the substantial time and effort which he devoted to personally researching the matter and reviewing the pertinent documentation before the initial EPSCA complaint had even been filed. There is nothing in the evidence which convinces the Board that Mr. Lyons’ interest in the matter subsequently waned. Indeed, his continued interest is evidenced by the fact that he devoted further time and effort to settlement discussions and consultation with counsel concerning the EPSCA proceedings, and took action to prevent Council funds from being used to finance that litigation. Mr. Lyons’ lack of candour concerning the

importance which he attributed to the EPSCA case reduces the weight which we are prepared to give to the totality of his evidence concerning motivation for imposition of the trusteeship.

85. The officials of the International who testified before the Board were uniformly of the view that filing Board proceedings against the International was not a proper action for the Council or its representatives to take. They were also of the view that payment of costs incurred by the Council in relation to Board proceedings in which the International was included as a respondent was not a proper use of Council funds. However, that view is not supported by the Bylaws of the Council, the International Constitution or the provisions of the *Labour Relations Act*. Although the Council was chartered by the International, the Council is a separate legal entity for purposes of the *Labour Relations Act*. The Council has its own sources of revenue, the proceeds of which can legitimately be used for such purposes, consistent with its Bylaws and the International Constitution, as may be determined at meetings of the full Council or, as evidenced by the manner in which the Council functioned prior to the trusteeship with the acquiescence of at least one International official, at meetings of the business agents of the Council. The objects of the Council (as set forth above) include protecting members “by legal and proper methods against any injustice that may be done them”. It cannot be doubted that filing a section 89 complaint with this Board is a “legal and proper means” by which the Council may seek to protect its members against a perceived injustice. (Whether or not such an injustice has in fact occurred is a matter to be resolved in the EPSCA complaint itself, and not in the instant proceedings.) Moreover, the Constitution (of the International) implicitly acknowledges (in Article XIX, Section 4, read in conjunction with Article XXII, Section 3) the legitimacy of a local union or district council initiating proceedings against the International before an administrative agency after internal union remedies have been exhausted, or resorted to for a specified period of time. (For an exposition of some of the considerations which the Board takes into account in deciding whether or not to defer to such internal procedures, see paragraphs 8 and 9 of the Board’s preliminary decision in this matter (reported at [1982] OLRB Rep. Feb. 233), and the authorities referred to in that passage.)

86. The business representatives who were delegates to the Council have acted on behalf of the Council in retaining and instructing counsel, commencing proceedings before this Board, and using Council funds to finance such proceedings on a number of previous occasions. All of this was done without objection by George Allen or any other official of the International. It was only after the business representatives commenced Board proceedings in the name of the Council against respondents which included the International, that Mr. Allen, on the instructions of Mr. Lyons, sought to prevent the business representatives from using Council funds as a source of financing those proceedings on behalf of the Council and its members whose perceived rights the business representatives sought to protect. In the totality of the circumstances of this case, including the significant role played by the Council as a co-ordinating vehicle in relation to the EPSCA complaint; the great importance which the complainant business representatives, to the knowledge of Mr. Lyons, attached to those proceedings; the obvious difficulty which at least one of the business agents would have had in attempting to finance those proceedings through his impecunious Local Union; and, most importantly, the nature of the allegations against the International that are

contained in the EPSCA complaint (i.e., allegations that the International, and the other respondents, committed a number of serious unfair labour practices by interfering with bargaining rights of the complainant Local Unions and the complainant Council), it appears to the Board that Mr. Lyons was seeking to penalize the complainant business agents by impairing their effective prosecution of the EPSCA complaint, when he instructed Mr. Allen in June of 1981 not to sign cheques for legal or other expenses pertaining to that case. Thus, that action might itself have been the subject of a section 89 complaint alleging a breach of section 80(2) of the Act. However, instead of coming to this Board, the complainant business representatives misguidedly and improperly sought a "self help" remedy by executing the trust document. When Mr. Lyons became aware that his direction to Mr. Allen had not served to effectively cut off the funding of that case, Mr. Lyons effectively recommended the imposition of trusteeship on the Council and gave specific instructions to Mr. Phair that no expenditures were to be made in support of the EPSCA case.

87. After carefully assessing all of the evidence, we have come to the conclusion that the trusteeship was imposed on the Council at least in part for the purpose of penalizing the complainant business representatives by depriving them of their Council positions (which were vacated by the trusteeship), because they had filed, or were about to participate in the EPSCA complaint. We also find that officials of the International sought to penalize the complainant business representatives by imposing a trusteeship on the Council, in an attempt to impair their prosecution of that complaint as representatives of the Council and its members.

88. The significance of the Council as a source of funding of the EPSCA complaint has already been discussed, as have the inferences which may properly be drawn from Mr. Lyons' actions concerning the use of Council funds in support of that complaint. Mr. Phair's letter of January 5, 1982 to Golden, Levinson provides further support for the inference that the International intended the trusteeship to be a vehicle through which it could penalize the complaint business representatives by impairing the effective prosecution of the EPSCA complaint through the removal of the Council as a complainant therein, irrespective of the validity or invalidity of the commencement of those proceedings by the business agents on behalf of the Council. Although counsel for the respondents contended that removal of the Council was essentially irrelevant since the other complainants could presumably proceed with it in any event, as noted by counsel for the complainant, the vigour with which the respondents pursued (through counsel) their preliminary objection concerning the inclusion of the Council as a complainant in the EPSCA complaint provides a clear indication that the presence or absence of the Council as a complainant in those proceedings does indeed "matter" to the respondents for legal, political, or other reasons. Moreover, as noted above, it is apparent that the monthly Council meetings of the business agents provided an effective forum for co-ordinating activities in respect of that complaint, which forum was effectively eliminated by the trusteeship.

89. For the foregoing reasons, the Board finds that by placing the Council under trusteeship for purposes that included imposing a penalty on the complainant business representatives because they filed or were about to participate in a proceeding under this Act, namely, the EPSCA complaint, the International contravened section 80(2) of the Act. In view of that finding, it is unnecessary to determine whether the International also contravened section 70 of the Act by imposing the trusteeship.

90. It may be appropriate to add, for the guidance of these and other parties, that the Board does not interpret section 80(2) as giving local union or district council officials an unqualified licence to use local union or district council funds to finance proceedings before this Board, or to use their positions to engage in activities which are in conflict with the duties and responsibilities of their offices. While each case must, of course, be considered on the basis of its particular facts, it appears to us that the Board would be unlikely to find the requisite motivation for a breach of section 80(2) to be present where, for example, an international union removed from office (whether by means of a trusteeship or other action) an official of a local union or district council who had used the local's or district council's funds to support an application to the Board for termination of the local's or district council's bargaining rights, or had persuaded employees to join a rival union and participated in certification proceedings initiated by that union. (See, for example, *Canadian Textile and Chemical Union*, ([1971] OLRB Rep. Aug. 469, in which the Board found that a local union president was not removed from office by the international for any reason that would violate (what is now) section 80(2) where he engaged in activities that were contrary to the interests of his local by initiating discussions with a rival union to raid his local, and signing up members of his local as members of the raiding union.) However, where the proceedings in question allege a significant unfair labour practice on the part of the international union itself, such as where pursuant to section 151(1) of the Act, a local union which is an affiliated bargaining agent alleges that its international, as part of a designated bargaining agency, has acted in a manner that is arbitrary, discriminatory or in bad faith, or where, as in the instant case, it is alleged that the international, together with other respondents, has substantially interfered with local union or district council bargaining rights, the requisite motivation may (depending on the circumstances) more readily be inferred.

91. Although we have found a contravention of section 80(2) of the Act, the existence of circumstances, and in particular the existence of the trust document, which could justify some intervention by the International into the affairs of the Council, has led the Board to conclude that it would not be appropriate to direct the International to rescind the trusteeship, as advocated by the complainants. Under the circumstances, the Board, in the exercise of its broad remedial discretion under section 89(4) of the Act, is of the view that it is more appropriate to restrain the manner in which the trusteeship is exercised so as to ensure that the imposition of the trusteeship does not in fact penalize the complainant business representatives by interfering with the pursuit of the EPSCA complaint. This can be accomplished by restoring the conditions which existed in respect of that complaint prior to the trusteeship, i.e., the availability of Council funds as a source of payment of legal and other legitimate costs pertaining to that complaint, incurred by the Council, or by the complainant business representatives on behalf of the Council; the presence of the Council as one of the complainants in that matter; and the power of the complainant business agents to continue to instruct counsel on behalf of the Council with respect to the EPSCA complaint, notwithstanding the trusteeship.

92. We recognize that the remedy which we find to be appropriate in this case does not totally remove the penalty which the International has imposed on the complainant business agents. However, it does eradicate the principal means by which the International has sought to penalize them by impeding the effective prosecution of the EPSCA complaint. The Board's refusal to order the rescission of the trusteeship as requested by the complainants, reflects not only our unwillingness to interfere with

internal trade union matters any further than is necessary to ensure unimpeded access to the Board's procedures for vindication of the rights guaranteed by the *Labour Relations Act*, but also a recognition on our part that the complainant business agents, by entering into the trust agreement in question and by otherwise failing to operate the Council in accordance with its Bylaws, have engaged in conduct which is not undeserving of some element of penalization, and have created a situation which justifies some degree of temporary control of the Council by the International.

93. The Board therefore orders:

(1) that the respondent International cease and desist from exercising supervision and control over the Ironworkers District Council of Ontario (the "Council") in such manner as to:

- (i) deny the complainant business representatives (Kenneth Childs, Allan MacIsaac, John Donaldson, Larry Baillie, Gordon Verdecchia, and Donald Melvin) access to Council funds for the purpose of paying legal accounts which have been duly taxed under the *Solicitors Act*, and other legitimate invoiced or vouchered expenses pertaining to the EPSCA complaint, incurred by the Council, or by the complainant business representatives on behalf of the Council;
- (ii) remove the name of the Council as a complainant in the EPSCA complaint; and
- (iii) prevent the complainant business representatives from continuing to instruct counsel on behalf of the Council with respect to the EPSCA complaint; and

(2) that the respondent International take all reasonable steps to ensure that the irregularities and deficiencies in respect of the operation of the Council are corrected expeditiously, and that the supervision or control of the Council by the International is terminated as quickly thereafter as practicable.

94. The Board remains seized of this matter in the event that a dispute arises concerning implementation of the Board's order.

1489-81-R Ontario Taxi Association 1688 C.L.C., Applicant, v. Maple Leaf Taxi Company, Respondent

Certification – Practice and Procedure – Reconsideration – Employer’s counsel raising several issues in opposition to certification application – Employer settling all issues and agreeing to waive hearing after counsel ceased representation – Seeking reconsideration through new counsel ten months after certificate issued – Board refusing to re-open matter settled

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members B.K. Lee and W.H. Wightman.

DECISION OF THE BOARD, October 29, 1982

1. This is an application for reconsideration of a decision of the Board dated January 12, 1982 in which the Board certified the trade union as the bargaining agent for a number of individuals employed by the respondent company. In order to understand the context in which the application for reconsideration arises, it is necessary to set out the course of these proceedings in some detail.

2. On October 9, 1981, the union applied to be certified as the bargaining agent for a bargaining unit of employees described as follows:

All employees of Maple Leaf Taxi Co. Ltd. in Toronto, Ontario, described as owner-operators (single car), operators (lease plate single-car), and drivers, save and except dispatchers, multi-car and plate owners, foremen, and those above the rank of foreman and office staff.

In accordance with its usual practice, the Board processed this application and scheduled a hearing for October 30, 1981 for the purpose of hearing the parties’ evidence and submissions with respect to all matters arising out of, or incidental to the application. On October 29, 1981, the respondent employer filed its reply to the application by its solicitor, Philip J. Wolfenden, – a practitioner experienced in labour relations matters who frequently appears before the Board. In that reply Mr. Wolfenden set out the following representations on behalf of the employer:

The Respondent takes the following positions in regard to the above-noted Application for Certification:

1. The persons for whom the Applicant seeks bargaining rights are not employees of the Respondent within the meaning of the Ontario Labour Relations Act. Rather, the Respondent submits these persons are independent businessmen with whom the Respondent cannot be said to have an employee/employer relationship.
2. Alternately, and apart from the above position, the Respondent submits the Board should not certify the Applicant as it would be

an Employer dominated organization as prohibited by Section 13 of the Ontario Labour Relations Act, R.S.O. 1980, Chapter 228.

3. Additionally, the Board should not certify the Applicant due to serious misrepresentations made by the Applicant's collectors during the organization drive. Specifically, the Union's collectors misrepresented to these independent businessmen that the purpose of their organization was to lobby with Metro Toronto in an effort to increase taxi fares. At no time were these independent businessmen told the purpose of the Applicant's organization was to bargain collectively with the Respondent. In this respect, the Respondent submits many membership cards were signed under a false representation and therefore should be disregarded by the Board.
4. As the Respondent is not in an Employer/employee relationship with anyone, the Respondent submits there is no appropriate bargaining unit in the circumstances.
5. In an effort to aid the Board in this matter, the Respondent has enclosed a Schedule "A" listing persons whom the Respondent submits are Owner-Shareholders of the Respondent. Many of these persons employ drivers whom the Respondent has no knowledge of and is therefore not in a position to submit those names to the Board.

3. The matter came on for a hearing before the Board, as scheduled, on October 30, 1981. At that time, Mr. Wolfenden appeared on behalf of the respondent employer and outlined the issues, as he saw them, along the lines set out in the respondent's reply. Essentially, it was his contention that there was a substantial question concerning the status of the individuals potentially affected by the application for certification. In particular, it was asserted that some or all of them might be "independent contractors" and, therefore, excluded from the *Labour Relations Act*, or alternatively, "dependent contractors" to whom special bargaining unit considerations might apply. The Board accepted these submissions and determined that it would be appropriate to appoint a Labour Relations Officer to meet with the parties and attempt to settle the employee list and the composition of the bargaining unit.

4. The question of whether an individual is an "employee" or and "independent contractor" is a difficult one at common law; moreover, the efforts of the Legislature to avoid some of these problems by creating the statutory concept of a "dependent contractor" has generated its own jurisprudence. The Board need not elaborate upon that jurisprudence here. It suffices to say that the legal and factual problems outlined by Mr. Wolfenden on behalf of the respondent employer are difficult ones, and it was for this reason that the Board considered it appropriate to appoint an Officer to meet with the parties in order to assist them, if possible, to resolve or narrow the issues in dispute. By decision dated November 2, 1981, the Board held:

1. The name: "Maple Leaf Taxicab Company Limited" appear-

ing in the style of cause of this application as the name of the respondent is amended to read: "Maple Leaf Taxi Company".

2. This is an application for certification. It is apparent on an examination of the material filed by the parties that there is a substantial dispute between them concerning the identity and status of the individuals affected by the application. Those issues must be resolved before the Board can proceed to the other aspects of the case. Accordingly, the Board hereby appoints an officer to inquire into the employee list and the composition of the bargaining unit, and to report to the Board. This appointment is made, of course, without prejudice to the respondent's right to raise the allegations contained in its reply; nor is it intended to foreclose either party from seeking further direction from the Board when they have more clearly defined the scope of their dispute. The Board further notes the agreement of the parties that this particular panel of the Board is not seized with this matter.

5. The Officer, following his appointment, convened a number of meetings of the parties for the purpose of resolving the dispute concerning the employee list and the composition of the bargaining unit. The Board's records indicate that such meetings were held on November 18th, December 3rd, December 10th, and December 21, 1981. On December 18, 1981, it appears that the Board Officer was informed that Mr. Wolfenden was no longer acting for the respondent. On December 21, 1981 shortly after his departure from the case, the parties were able to reach an agreement with respect to the bargaining unit description and the list of employees who would fall within such bargaining unit. The respondent also agreed to withdraw the various charges made against the applicant union set out in the respondent's reply. In effect, all of the issues raised by Mr. Wolfenden in the respondent's reply were resolved by agreement of the parties. This agreement purports to be signed by responsible officers of the respondent, and bears the respondent company's corporate seal. The agreement, of course, disposed of difficult factual and legal issues which would otherwise have to be resolved by the Board through litigation. The agreement reads:

The parties above agree as follows:

1. All charges by the Respondent against the Applicant are withdrawn.
2. The bargaining unit shall be: –

"All owner operators and drivers employed by the respondent in Toronto Ontario save and except Supervisors personnel [sic] above the rank of supervisor, Multiple operators, Dispatchers and office staff.
3. That the attached (Schedule "A") as amended is the list of employees for the purpose of the count.

4. That the parties agree to waive the officer's report in this matter.

Dated at Toronto the 21st of December 1981.

6. On December 21, 1981, the parties also executed a waiver of hearing which reads as follows:

The parties have appeared before an Officer of the Board and subject to the Board's normal practice of second check, hereby consents to the Board issuing a decision in this matter based upon the submission made and agreements reached without a hearing before a panel of the Board.

This waiver of hearing document also purports to be executed on behalf of the respondent. While it appears that the respondent's former solicitors had withdrawn by this point, there is no indication that the respondent sought further legal advice before executing these documents. On the other hand, the Board's records indicate that Mr. Wolfenden was "on the record" until at least December 18, 1981, when he informed the Board Officer that he was no longer acting on behalf of the respondent,

7. On January 12, 1982, on the basis of the agreement of the parties resolving the matters in dispute between them, the Board issued a decision in the following terms:

1. The name: "Maple Leaf Taxicab Company Limited" appearing in the style of cause of this application as the name of the respondent is amended to read: "Maple Leaf Taxi Company".

2. This is an application for certification.

3. When this matter originally came on for a hearing, the parties were in substantial dispute concerning the number and status of the individuals in the applicant's proposed bargaining unit. In accordance with its usual practice, the Board appointed a labour relations officer to inquire into the employee list and the composition of the bargaining unit; and after a number of meetings with the officer, the parties were able to resolve all of the matters in dispute between them. The parties were also content that this matter be disposed of pursuant to their agreement without the necessity of a further hearing.

4. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.

5. Having regard to the agreement of the parties, the Board finds that all owner-operators and drivers employed by the respondent at Toronto, Ontario, save and except supervisors, persons above the rank of supervisor, multiple operators, dispatchers, and office

staff, constitute a unit of employees appropriate for collective bargaining.

6. On the basis of the membership evidence filed by the applicant, and the parties' agreement with respect to the composition of the bargaining unit, the Board finds that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on October 23, 1981, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

7. A certificate will issue to the applicant.

8. The Board notes the agreement of the parties to withdraw all charges of misconduct made in connection with this application.

8. On October 20, 1982, more than ten months after the original Board decision, the respondent, by a new firm of solicitors, wrote to the Board:

Gentlemen:

Re: Maple Leaf Taxi Company Ltd.

As you are aware from previous correspondence, we act on behalf of the above-noted company with respect to a decision made on January 12, 1982, regarding certification of Ontario Taxi Association 1688 C.L.C. by the Labour Relations Board.

After reviewing this matter with our client, we wish to make an application under Section 106 of the *Labour Relations Act* to have the Board reconsider the certification of the Union pursuant to the said Section and have the certification set aside. The facts and circumstances regarding the basis of this request are as follows:

Our client advises us that at the time the hearing was held on January 12, 1982, it was not represented by counsel although the original opposition to the certification was filed by counsel on behalf of Maple Leaf Taxi Company Ltd. Apparently, at that time counsel did not wish to represent our client prior to the January 12th decision and our client advises us that it was too late to retain other counsel to act for it. Also, they could not afford to pay new counsel at that time.

This particular certification involved the certification of the taxi drivers and owners of taxi motor vehicles. As you may be aware, this involved an issue with respect to whether or not the

union's members were independent or dependent contractors as defined by the *Labour Relations Act*. As you may also be aware, there are cases conflicting as to whether or not the taxi drivers and owners fit within this category of employee of [sic] dependent contractors within the *Labour Relations Act*. Whether or not any individual group of such drivers, owners and operators falls within this category largely depends on the circumstances of each individual case.

Of course, our client without legal representation was not aware of these fine distinctions between law and fact. Our client has advised us that had they had the benefit of legal advice they would not have agreed to have the certification of the union on the basis that in their particular case the taxi drivers and owners were not in an employee relationship with the company and therefore they were not an appropriate bargaining unit. In fact, it appears that these particular drivers and owners were really independent contractors.

As it appears that all of the facts were not before the Labour Relations Board at the time the decision was made, we would ask that arrangements be made for a new hearing under Section 106 of the *Labour Relations Act* in order that the certification may be set aside.

Kindly advise us of the date this matter may be heard.

Thank you for your assistance herein.

For the reasons set out in this letter, the respondent's new solicitors request the Board to reconsider its decision and set aside the certificate.

9. In his reply on behalf of the respondent, and his able submissions before the Board on October 30, 1981, Mr. Wolfenden, then the respondent's counsel, accurately and comprehensively outlined the factual and legal issues which might be raised by the application for certification and which would have to be resolved, through litigation, if the parties were unable to reach some agreement. That is why the Board appointed a Labour Relations Officer, and it might be noted, that appointment was expressly made without prejudice to the respondent's right to raise the various issues set out in its reply. Moreover, it appears that the respondent continued to be represented by counsel for at least some period of time following the Board decision. Thereafter, it is said that the respondent was without counsel and that it entered an arrangement which was improvident. But there is no indication that the respondent made any effort to secure alternative legal advice at that time. On the contrary, on December 21, 1981, it decided to proceed, without counsel, and settle the substantive issues in dispute – in effect agreeing that a number of individuals whose status was disputed were indeed employees within the meaning of the Act. It was on the basis of that agreement that the Board issued its decision of January 12, 1982.

10. There was no hearing on January 12, 1981. No hearing was necessary. The parties had resolved the matters in dispute, had waived their right to a hearing, and indicated that they were content that the Board issue its decision on the basis of their agreement. Now, ten months later, the respondent seeks to resile from its earlier agreements and bring the matter on before the Board.

11. In proceedings before the Labour Relations Board parties are entitled, but not required, to be represented by lawyers. In the instant case, at the outset, the trade union was not represented by a solicitor and the respondent was represented by experienced labour relations counsel. Counsel on the respondent's behalf raised a number of issues of fact and law which would have to be resolved through litigation if the parties were unable to reach some accomodation short of that. But that is what they did, and we do not think it is now open to the respondent to repudiate its earlier agreement and litigate issues which had been formally resolved. There is no suggestion that the Board denied the respondent the right to a hearing on the issues which were raised in its reply. On the contrary, the appointment of a Labour Relations Officer was expressly made without prejudice to the respondent's right to do so. If the respondent chose to proceed without counsel to settle the issues in dispute between the parties, it did so at its own peril; moreover, it is a little difficult to understand why it let ten months go by before seeking reconsideration.

12. Nor is it easy to understand how individuals operating a business and possessing ordinary common sense could be under any illusion as to the nature and potential effect of their agreement. Despite the sometimes difficult determination of whether an individual is an "employee" or an "independent contractor" (a problem which the Legislature sought to simplify with the notion of a "dependent contractor" found in section 1(1)(h) of the Act) the certification process itself is relatively straightforward. In essence, it is a matter of determining whether a trade union enjoys majority support among a group of employees. The respondent initially claimed that the drivers were not employees but small businessmen. Later it conceded and agreed that certain of them were, indeed, employees. Once the respondent had agreed to the composition of that employee group it must have understood that a certificate would issue if the union could demonstrate the required support. And if there was any misapprehension in this regard why did the respondent wait for ten months before requesting reconsideration? Its second thoughts were rather long in surfacing.

13. The respondent may well have compromised its position in a manner which, in retrospect it considers imprudent, and had it continued to be represented by Mr. Wolfenden or sought other legal advice (as it was entitled and had the opportunity to do) it might not have agreed to settle its case. But it would make nonsense of the settlement process which the Board, like the Courts, seeks to encourage, and it would be patently unfair to the applicant union if the matter were now re-opened. There are literally hundreds of cases before the Board every year which are either settled entirely or expeditiously resolved because of the parties' agreement on certain factual or legal issues. On the basis of such agreements, the Board typically issues a decision which is, by section 106 itself, expressed to be both final and binding for all purposes (see also section 108). To hold that these decisions should be reconsidered, months later, because a party asserts that he acted without adequate legal advice would substantially prejudice

the private resolution of industrial disputes and contribute to an escalation of litigation. And, in this case, of course, the respondent was initially represented by experienced counsel who accurately and astutely put the respondent's position to the Board. It was the respondent itself which decided to proceed without counsel and compromise its stated position.

14. Section 106 gives the Board an extraordinary authority to reconsider its earlier decisions. But for the foregoing reasons we do not think this is an appropriate case for reconsideration. Nor is it necessary or appropriate to schedule a new hearing in this matter as requested by the respondent's new solicitors. The application for reconsideration is therefore dismissed.

1605-81-M; 1607-81-M MHG International Ltd., Applicant, v. International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers, Local Union 128, Respondent v. Boilermaker Contractors' Association, Intervener

Construction Industry Grievance – Employer ordering vessels from non-union shop without consulting applicant – Requirements in agreement only suggestion and not mandatory – Dismissed

BEFORE: Ian Springate, Vice-Chairman, and Board Members J. A. Ronson and B. L. Armstrong.

APPEARANCES: *Paul Cavalluzzo, Matt Bakker, Bob McDonald, Stan Petronski and John Carroll for the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, Local Union 128; B.W. Binning and Gerry Binette for MHG International Ltd.; R.C. Fillion and D. A. McDonald for the intervener.*

DECISION OF IAN SPRINGATE, VICE-CHAIRMAN, AND BOARD MEMBER J. A. RONSON; October 18, 1982

1. The International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers Local 128 (which along with its parent international union will henceforth be referred to as "the union") as well as MHG International Ltd. (which, along with a related company, Monenco Limited, will be referred to as "the company") have both referred the same grievance to the Board for determination pursuant to section 124 of the *Labour Relations Act*.

2. The union and the company are bound by the provisions of a collective agreement entered into between the union and the Boilermaker Contractors' Association. The agreement covers employees engaged on field construction work. The union contends that the company violated a letter of intent incorporated by reference into the collective agreement by having certain vessels to be used at the Polysar Butyl II expansion project in Sarnia fabricated in a non-union shop.

3. The relevant article in the collective agreement, as well as the letter of intent, are set out below:

“Article 29:00 – Employers’ Responsibility

29:01

It shall be the responsibility of all Employers signatory to this Agreement to comply with the letter of July 1967 relating to subcontracting of work within the jurisdiction of the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers.

“Letter Referred to in
Article 29:00

To: All signatory companies to the Boiler Erection and Field Construction Agreement (Canada) – 1966–1969.

Gentlemen:

During negotiations of this Agreement in June and July of 1966, the Union had requested inclusion of a clause covering sub-contract work on the various projects to be included in the National Agreement. Subsequently this was omitted because of the difficulties in arriving at suitable language which would be satisfactory to both the Union and the signatory companies. However, it was agreed at that time that even though a sub-contract clause was not part of the National Agreement, this did not allow a signatory company to sub-contract their work to a non-union or non-signatory contractor and thus avoid their contractual obligations with the Boilermakers Union. Therefore any sub-contract work for field construction should be awarded only to another signatory contractor.

During negotiations, the question of fabrication in various shops of work coming under the jurisdiction of the Boilermakers’ Union on field erection, was discussed. It was pointed out to the representatives of the member companies present that considerable difficulty was being experienced and much pressure made to bear by industrial fabricators in agreement with the Boilermakers’ Union to having work done in their shops. Further it was pointed out that due to the fact that national contractors had a contractual obligation to the various pipefitting work and fabrication done in shops in agreement with the United Association, on a local or national basis, consideration should be given to the Boilermaker Fabricators when work was being awarded.

The Boilermakers pointed out that contractually there was no obligation for contractors to solicit only companies in agreement with the Boilermakers to do their fabrication work. It was suggested

that in order to minimize difficulties that might be encountered in areas where such work is scheduled and which are highly union organized, that contractors try to place their fabrication work in Boilermaker shops or shops which are organized by other A.F.L. or C.I.O. unions. If, however, it became necessary to place orders in non-union shops because of scheduling or by reason of particular manufacturing needs or requirements, then the matter should be discussed with the Boilermakers' International in order that agreement can be reached and any subsequent problems in connection with the field erection of this work be avoided.

International Brotherhood of
Boilermakers,
Iron Ship Builders, Blacksmiths,
Forgers and Helpers

John D. Carroll,
International Vice-President
Eastern Canada.

Donald G. Whan,
International Vice-President
Western Canada.

Negotiating Committee of the Signatory Companies to the Boiler
Erection and Field Construction Agreement (Canada)

W. J. Gibson, Chairman.

E. F. Dubose, Secretary.

DATED this 17th day of July, 1967."

4. A number of vessels and exchangers were required on the Polysar project. Some time in July of 1980 Mr. W. Colborne, the senior company official associated with the project happened to meet Mr. J. McManus, a union official. At this meeting, Mr. McManus told Mr. Colborne that the company better not buy vessels from non-union shops, for if it did they would not be installed. Mr. Colborne's response was that it was none of Mr. McManus' concern where the vessels were obtained from.

5. In October of 1980 the company sent to Polysar's project manager a list of possible bidders for the vessels in question. The list included the names of a number of shops which had collective agreements with the union, as well as a number of non-union shops. One of the non-union shops was O'Connor Tanks. On October 30, 1980 the bid list was signed as approved by an official of Polysar and returned to the company.

6. The firms included on the list were invited to tender for the work. After the bids had been received, they were analyzed by Mr. Colborne. On the basis of price, (with a check to ensure an acceptable delivery date) Mr. Colborne decided that the

O'Connor Tanks bid should be accepted. The company did not contend at the hearing that the unionized firms which bid on the work could not meet the company's scheduling or production requirements. On April 14, 1981 the company sent a recommendation to Polysar that O'Connor be awarded the work. The document was signed as approved by Polysar's project manager and returned to the company. O'Connor Tanks was advised as early as March 11, 1982 that it was the successful bidder.

7. In late April or early May of 1981 Mr. S. Petronski, a Vice-President of the Boilermakers International, visited Mr. Colborne. During this meeting Mr. Petronski asked to be given a list of manufacturers of the vessels to be used on the project in question. Mr. Colborne responded to this request on May 27, 1981 by providing Mr. Petronski with a list of manufacturers. Included on the list was O'Connor Tanks. This appears to be the first time that the union was advised that vessels fabricated by O'Connor Tanks were to be used.

8. Early in September of 1981, Mr. Murray, the company's construction manager, met with Mr. Carroll and Mr. Bakker from the union. It was agreed at the meeting that the company would at some later time provide justification for having directed work to O'Connor Tanks. On October 2, 1981 a meeting was held between representatives of the union and the Boilermaker Contractors' Association. The meeting was chaired jointly by Mr. Carroll of the union and Mr. McDonald of the Association. During the meeting, the Polysar project and the interpretation to be given to the letter of intent were discussed. Apparently, Mr. Carroll stated that the letter meant that vessels built in non-union shops could not be used without prior union approval, and Mr. McDonald agreed with this interpretation. At some point during the meeting, Mr. Carroll stated that non-union vessels would not be installed on the Polysar site. Mr. Colborne testified that he had been in attendance at this meeting with documents to justify to the union the company's decision to order vessels from O'Connor Tanks. The documents related only to the price and delivery dates contained in the various bids for the work. According to Mr. Colborne, once Mr. Carroll stated that non-union vessels would not be installed on the project he concluded there was really nothing to discuss with the union, and accordingly, he left the meeting.

9. The first O'Connor vessels arrived at the job site in September of 1981. Apparently, one vessel was off-loaded by members of the union, but then they refused to install it. Later as other vessels arrived, members of the union refused even to off-load them. The company responded to this action by applying to the Board for a cease and desist order against the employees for engaging in an unlawful strike. The Board issued such an order on October 16, 1981. In issuing its order the Board rejected the union's contention that no order should be made because the company had violated the letter of intent. The Board indicated that any such alleged violation should be dealt with through the grievance procedure and not through unlawful industrial action. Following the issuing of the Board's cease and desist order, the union members both off-loaded and installed the O'Connor vessels, and the union filed the grievance which is now before us.

10. The union takes the position that the company violated the letter of July 17, 1967 in two distinct ways, namely, it failed to consult with the union prior to ordering vessels from a non-union shop, and it failed to provide the union with justification on

the basis of either scheduling or particular manufacturing needs for having gone to a non-union shop. We are satisfied that the company did, in fact, fail to do either of these things. The question remains, however, as to whether its failure to do so amounted to a breach of the letter of intent and hence of the collective agreement.

11. The third paragraph of the letter of July 17, 1967 expressly provides that "contractually there was no obligation for contractors to solicit only companies in agreement with the Boilermakers to do their fabrication work". The letter does go on to state that "it was suggested . . . that contractors try to have their fabrication work done in Boilermaker or other shops with A.F.L. - C.I.O. unions", but it is important to keep in mind that this is a suggestion only. The last sentence of the letter provides that "If, however, it became necessary to place orders in non-union shops because of scheduling or by reason of particular manufacturing needs or requirements, then the matter should be discussed with the Boilermakers' International." This wording, if used in another context, might well be interpreted to suggest that shop fabrication work could only be given to non-union firms if it became necessary due to scheduling or manufacturing needs. Given the thrust of the entire paragraph, however, and in particular the fact that it was only a suggestion that companies try to place their fabrication work in union shops, we do not interpret the sentence as implicitly creating a requirement that absent any special scheduling or manufacturing considerations fabrication work must be done in union shops. Instead, we view the sentence as relating to contractors who adopt the suggestion that they try to place their work in unionized shops, but find themselves unable to do so because of manufacturing or scheduling requirements. The letter indicates that contractors in this situation "should" discuss the matter with the Boilermakers Union in order to avoid any subsequent problems. In this context we believe the word "should" is to be interpreted as a suggestion and not as a mandatory command. Given this interpretation, we are satisfied that the letter created no actual obligation on the part of the company to justify to the union why it directed the work to a non-union shop.

12. Although we are of the view that the company did not violate any mandatory requirement contained in the letter of July 17, 1967, we would add that in our view the company certainly ignored the underlying spirit of the letter, which is that although not compelled to do so, contractors should try to place their fabrication work with unionized shops or, if unable to do so due to manufacturing or scheduling requirements, discuss the matter with the union.

13. Having concluded that the company's action did not involve a breach of any mandatory requirement under the letter of July 17, 1967, the grievance is hereby dismissed.

DECISION OF BOARD MEMBER B.L. ARMSTRONG;

1. I have read the decision of the majority which dismisses this grievance and I find that I must disagree with their interpretation of this collective agreement, including the letter of intent. My view is that the employer has violated the collective agreement in this case, and that this Board should uphold the intent of the parties which is made clear by the letter of July 17, 1967 incorporated by reference into their collective agreement.

2. The first part of the letter, which deals with field construction work, concludes with the words "any sub-contract work for field construction *should* be awarded only to another signatory contractor". It is an accepted rule of interpretation that the terms "shall" or "should" (as opposed to "may" or "might") denote mandatory obligations. The third paragraph of the letter seems to qualify this obligation created by paragraph #1 with respect to the fabrication of vessels in shops. The parties realized the difficulties in always using union shops for this type of work so the employers agreed to *try to* place their fabrication work in union shops. In my view, this imposes an obligation on the company to make a reasonable effort to place fabrication work in union shops.

3. Even if this obligation is only regarded as not being a legally enforceable one, because of paragraph three of this letter (as the majority has done) this does not affect the second obligation imposed by the third paragraph. This second obligation is introduced by the phrase, "If, however, it became necessary to place orders in non-union shops...". The word "however", separates this second obligation from the first, and imposes on the company an independent duty to discuss the matter with the union even if there is no strict obligation to try to place fabrication work in union shops.

4. The same structure of words is used to conclude the third paragraph as the first ... namely, "the matter should be discussed with the Boilermakers' International...". In my view the use of the term "should" clearly imposes an enforceable obligation to discuss. The letter conclusively indicates that sub-contract work for field construction *should* be awarded only to another signatory contractor and that the placement of orders for the fabrication of vessels in non-union shops should be discussed with the Boilermakers' International. In my view, both of these obligations are mandatory ones which may be enforced by this Board. However, even if the former is qualified, there is no question in my mind as to the obligation to discuss.

5. The interpretation I have suggested is a reasonable one having regard to the words of the letter of intent, and a necessary one having regard to the "underlying spirit of the letter" (as the majority has phrased it). I would adopt the view that "an arbitration board is entitled to give effect to the underlying aim of a clause ... where it can do so by imputing to the clause a meaning which it can reasonably bear" *Standard (Canada) Ltd.*, 22 LAC 377 (Weiler), and apply it to this case.

6. In my opinion, the company violated the collective agreement by failing to consult with the union prior to ordering vessels from a non-union shop, and by failing to discuss the matter with the union even after it had ordered the vessels.

0445-82-U Ontario Nurses' Association Staff Union and Margaret O'Connor, Complainant, v. Ontario Nurses' Association, Respondent

Arbitration – Practice and Procedure – Unfair Labour Practice – Allegation that discharge prompted by employee's testimony at arbitration hearing – Whether arbitration proceeding coming within "proceeding under this Act" in section 80 – Whether Act's protection extending to arbitration hearings

BEFORE: Ian Springate, Vice-Chairman, and Board Members L. Hemsworth and M. J. Fenwick.

APPEARANCES: *Elizabeth J. Shilton Lennon, Bram Herlich and Margaret O'Connor for Margaret O'Connor; Mary Cornish and Maureen O'Halloran for the Ontario Nurses' Association Staff Union; James B. Noonan, Richard J. Nixon and Jane Ford for the respondent.*

DECISION OF THE BOARD; October 5, 1982

1. This is a complaint under section 89 of the *Labour Relations Act* in which the complainants contend that Miss Margaret O'Connor has been dealt with by the respondent contrary to the provisions of sections 64, 70 and 80 of the Act.

2. On or about May 27, 1982, Miss O'Connor was terminated from her position as Senior Executive Officer of the Ontario Nurses' Association. The complainants submit that Miss O'Connor's termination was prompted by the fact that she had testified at an arbitration hearing in connection with a grievance filed on behalf of an employee represented by the Ontario Nurses' Association Staff Union. The grievance, which was filed some time in April of 1982, alleged a violation of a collective agreement entered into between the Ontario Nurses' Association and the Ontario Nurses' Association Staff Union. By its terms, the collective agreement was to expire on December 31, 1981 but the terms and conditions set forth in the agreement were extended to some time in June of 1982 by force of section 89 of the Act. The grievance was not heard by a board of arbitration as provided for under the collective agreement but by a sole arbitrator appointed by the Minister of Labour at the joint request of the parties. It was the understanding of the parties that the arbitration would be conducted in accordance with the provisions of section 45 of the Act which relates to expedited arbitrations.

3. The complainants contend that Miss O'Connor's termination violated several sections of the Act including section 80(1) which provides as follows:

"No employer, employers' organization or person acting on behalf of an employer or employers' organization shall,

(a) refuse to employ or continue to employ a person;

(b) threaten dismissal or otherwise threaten a person;

(c) discriminate against a person in regard to employment or a term or condition of employment; or

(d) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of a belief that he may testify in a proceeding under this Act or because he has made or is about to make a disclosure that may be required of him in a proceeding under this Act or because he has made an application or filed a complaint under this Act or because he has participated or is about to participate in a proceeding under this Act.”

The respondent contends that the phrase “proceeding under this Act” as used in section 80 should not be interpreted to include a hearing before a sole arbitrator or board of arbitration, and that, accordingly the section cannot apply to Miss O'Connor.

4. Arbitration proceedings are dealt with at some length in the *Labour Relations Act*. Section 44(1) provides that every collective agreement must provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application or alleged violation of the agreement. A collective agreement lacking such a provision is deemed to contain the terms of an arbitration clause set out in section 44(2). An arbitration clause that proves to be inadequate may be modified by this Board pursuant to section 44(3). If there is a failure to appoint an arbitration board or arbitrator, section 44(4) allows the Minister to make the necessary appointments. An arbitrator or arbitration board's authority to summon and enforce the attendance of witnesses and to compel them to give evidence on oath is a power conferred under section 44(8) of the Act. Section 44(11) sets out how arbitration awards are to be enforced. Section 45 of the Act provides a procedure for expedited arbitrations which can be requested by either party, and which operates notwithstanding the arbitration provision contained in the relevant collective agreement.

5. The effect of the compulsory nature of the arbitration provisions contained in the Act was considered by the Ontario Court of Appeal in *Re The International Nickel Company of Canada Limited and Rivando* [1956] O.R. 379. In that case the issue arose as to whether or not a board of arbitration was a statutory tribunal subject to control by the Courts through the writ of certiorari. Mr. Justice Aylesworth in delivering the judgement of the Court reviewed the provisions of the *Labour Relations Act* relating to boards of arbitration, and then concluded:

“With respect, it seems to me that the element and degree of compulsion inherent in the *Labour Relations Act* regarding arbitration of industrial disputes establishes the instant board of arbitration as a statutory board. If this be so, then admittedly certiorari may issue to it from this Court.”

6. In that an arbitration board is a statutory tribunal, it cannot be viewed as a private tribunal of concern only to the parties to the relevant collective agreement. This point was made clear by the Ontario Divisional Court in *Re Toronto Star Ltd. and Toronto Newspaper Guild* (1976) 73 D.L.R. (3rd) 370 where the Court reviewed the ruling of a board of arbitration to the effect that once one of the parties to an arbitration hearing had requested that the hearing be held in private, the arbitration board lacked

jurisdiction to permit the public to attend. The court disagreed with this conclusion, holding that the board of arbitration had a discretion to determine whether or not the public should be admitted to its proceedings. In reaching this conclusion the Court stated:

"If the parties choose an arbitration they can agree on any of the terms of that arbitration, including privacy, but this is not consensual arbitration. It is the determination of rights by a statutory tribunal to which the parties are compelled to submit and the public has an interest in the functioning of such a tribunal."

7. If a board of arbitration is a statutory and not merely a private tribunal, it must be because it is established pursuant to the provisions of the *Labour Relations Act*. This point was recognized by the Ontario Court of Appeal in *Regina v. Barber et al.*, *Ex parte Warehousemen and Miscellaneous Drivers' Union Local 419* [1968] 2 O.R. 245 when dealing with the extent of the Courts ability to review the decision of a board of arbitration. In delivering the judgement of the Court, Jessup, J.A. stated:

"In my opinion the supervisory powers of this Court exercised by the remedy of certiorari *over arbitration boards constituted under the Labour Relations Act*, as well as over statutory boards and tribunals of all other kinds, is as full and complete where questions of law are specifically referred for determination as in a case where a question of law is only material to the issues to be arbitrated."

(emphasis added)

8. If a board of arbitration, and by analogy a sole arbitrator, is a statutory tribunal constituted under the *Labour Relations Act*, then a hearing before a board of arbitration or sole arbitrator must be a "proceeding under the Act". This being the case, we are satisfied that persons who testify at an arbitration hearing are protected against reprisals for having done so by section 80 of the Act. In our view any other result would be unreasonable, since it would mean that pursuant to section 44 of the *Labour Relations Act* a person could be summoned before an arbitration board and compelled to give evidence under oath, and yet not receive the protection accorded to witnesses who testify in proceedings under the Act.

9. Having regard to the above, we are satisfied that a hearing before a sole arbitrator or an arbitration board is a "proceeding under this Act" as that term is used in section 80 of the *Labour Relations Act*, and that, accordingly, Miss O'Connor is entitled to the protections afforded to witnesses under section 80.

10. On September 16, 1982 the parties were orally advised of the Board's conclusion set out above. The parties subsequently requested that the complaint be adjourned *sine die*. Having regard to this request, the Board hereby consents to adjourn this complaint *sine die* for a period not exceeding one year. Unless within that time the parties request that the Board proceed with the matter, it will be terminated.

1412-81-R Retail Clerks Union, Local 409, Applicant, v. **Phillips Security Agency Inc.**, Respondent.

Employee – Person employed by security firm as by-law enforcement officers – Performing parking meter patrol service under contract between employer and city – Not excluded from Act as members of police force – Analysis of “Police” exclusion in Act

BEFORE: Pamela C. Picher, Vice-Chairman and Board Members D. B. Archer and J. Bell.

APPEARANCES: J. McMullen and M. Fraser for the applicant; F. J. W. Bickford for the respondent.

DECISION OF THE BOARD; October 27, 1982

1. This is an application for certification.
2. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
3. The union has applied to be certified as the exclusive bargaining agent for “all employees of the respondent employed in the City of Thunder Bay, other than those employed as guards protecting the property of employers, save and except supervisors, persons above the rank of supervisor and office staff”. The persons covered by this proposed bargaining unit are by-law enforcement officers who spend most of their time enforcing parking by-laws, and, where warranted, ticketing cars.
4. The respondent raised a preliminary objection to the union’s application. It maintains that the Board does not have jurisdiction to certify the union to represent the persons in the bargaining unit described above because, in its view, the by-law enforcement officers are members of a police force within the meaning of section 2(d) of the *Labour Relations Act* which provides as follows:

2. This Act does not apply,

• • •

(d) to a member of a police force within the meaning of the *Police Act*.

5. At the Board’s initial hearing counsel for the respondent further argued that the by-law enforcement officers covered by the instant application were security guards within the meaning of section 12 of the Act. He asserted that for this reason as well the Board was precluded from certifying the applicant union as their bargaining agent. In argument, however, counsel did not pursue this argument and the Board, particularly in view of its decision in *Metropol Security Limited*, [1980] OLRB Rep. Dec. 1755, concludes that it has been withdrawn.

6. Previous to the instant application for certification the Board, in *Metropol Security Limited*, certified the applicant union for a group of employees which counsel

for the respondent acknowledges included employees who performed the same duties as the persons falling within the bargaining unit applied for by the union in the instant application. In its *Metropol* decision, the Board referred to these employees as "Category I: The By-Law Enforcement Officers for the City of Thunder Bay." At paragraph 10 of its decision the Board reached the following conclusion:

With respect to the persons in Category I ... the answer to this question [of whether they are employed as guards to protect the property of an employer] is quite obvious. The persons in Category I, that is the By-Law Enforcement Officers, do not in the course of their duties protect any property at all. Therefore, they are not affected by section 11 [(now section 12) of the *Labour Relations Act*].

Accordingly, the Board certified the applicant union as their bargaining agent.

7. In the *Metropol* case, however, the respondent employer did not argue that the by-law enforcement officers were precluded from being certified because they were members of a police force. It is this argument that now comes before the Board.

8. Through an interim decision dated November 25, 1981, the Board appointed one of its officers to inquire into and report to the Board on all matters pertinent to determining whether the individuals in question are members of a police force including their duties and responsibilities, the basis of their appointments, if any, as by-law enforcement officers and any matters relevant to determining whether Philips Security Agency Inc. is in fact their employer.

9. Pursuant to his appointment, the Officer met with the parties. Through the following letters, however, the parties agreed to waive his examination and to accept both the Report of the Board's Officer and the Board's factual determinations in the *Metropol* case, *supra*. The letter filed by the union is dated January 12, 1982 and provides,

Re: Phillips File 1412-81-R

This letter will serve to confirm our telephone conversation today wherein the Union has agreed to waive the examination in this application and to proceed with the hearing on the basis of the evidence and testimony received from the previous application in Metropol Security, your file number 2252-79-R.

Trusting this meets with your approval, I remain,

Yours truly,

Jeff McMullen.

The letter from counsel for the employer is dated February 8, 1982 and reads as follows:

Re: *Phillips Security Agency Inc. Application for Certification Retail Clerks Union Board File No. 1412-81-R*

Further to my letter of January 12, 1982, I wish to confirm my telephone conversation with Mr. Bowman on Friday, February 5th, 1982 when I advised him that we are prepared to treat the transcript of the Examinations conducted during the Metropol case as determinative of the present duties of by-law enforcement officers employed by Phillips Security and as well, we accept and will not contest any of the findings of fact found by the Board in the Metropol case including paragraph 4.

Although we will not challenge any of the findings of fact in the Metropol case, we trust that we will be able to make any representations with respect to the duties of the by-law enforcement officers vis-a-vis the police force provided that such representations do not challenge any findings of fact by the previous Board.

Yours very truly,

WEILER, MALONEY, NELSON

PER:

F. J. W. Bickford

10. The findings of fact of the Board in the *Metropol* case which the parties in the instant case accept as applicable to the by-law enforcement officers applied for in the instant application are as follows:

1. The service performed by the company's by-law enforcement officers is supplied under contract to the City of Thunder Bay on behalf of its parking authority.
2. The contract calls for a number of enforcement officers to write tickets for parking violations.
3. These by-law enforcement officers are uniformed and patrol given areas of the City.
4. They are all licenced security guards.
5. Further supplied pursuant to the contract with the City of Thunder Bay are services relating to parking garages. The by-law enforcement officers operate toll booths for the parking garages.
6. The only duty of the by-law enforcement officer is to complete tickets with respect to violations of parking by-laws. This does not extend to traffic laws.

7. If anything beyond the writing of a ticket occurs, the by-law enforcement officers are clearly instructed to call the police as would any citizen.

11. Section 2(d) of the Act provides that the Act does not apply to members of a police force within the meaning of the *Police Act*. Section 23(1) of the *Police Act*, R.S.O. 1980, c. 381 as amended by S.O. 1981, c. 55 provides as follows:

23(1) Every person employed in a police force shall be deemed to be a member thereof.

Other relevant provisions of the *Police Act* and Regulations made thereunder are set out below:

1. In this Act,

(c) "board" means a board of commissioners of police;

(d) "Commission" means the Ontario Police Commission;

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PART I

DIVISION OF RESPONSIBILITY

2.-(1) Every city and town is responsible for the policing of and maintenance of law and order in the municipality and for providing and maintaining an adequate police force in accordance with the police needs of the municipality.

• • •

3.-(1) The Ontario Provincial Police Force is responsible for policing all that part of Ontario that is not in a municipality or part of a municipality referred to in section 2, but the Ontario Provincial Police Force is not responsible for policing any part of Ontario in which a municipal police force is maintained.

(2) For the purpose of subsection (1), *municipal law enforcement officers shall not be deemed to be a municipal police force.*

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PART II

MUNICIPAL POLICE FORCES

8.-(1) Notwithstanding any special Act, *every municipality that provides and maintains a police force and that has a population of*

more than 15,000 according to the last municipal census shall have a board, . . .

• • •

14.-(1) Subject to subsection (3) and to clause 42(1)(g), *the police force in a municipality having a board shall consist of a chief of police and such other police officers and such constables, assistants and civilian employees as the board considers adequate*, and shall be provided with such accommodation, arms, equipment, clothing and other things as the board considers adequate.

(2) *Every board shall, on or before the 1st day of March in each year, prepare and submit to the council or each council responsible for maintaining the force, for its consideration and approval its estimates of all monies required for the year to pay the remuneration of the members of the police force and to provide and pay for the accommodation, arms, equipment and other things for the use and maintenance of the force.*

(3) Where the council does not agree with the board on the estimates or on the adequacy of the number of members of the police force or the accommodation, arms, equipment or other things for the use and maintenance of the force, the Commission shall determine the question after a hearing. R.S.O. 1980, c. 381, s. 14.

15. *The members of the police force in a municipality having a board shall be appointed by the Board.* R.S.O. 1980, c. 381, s. 15.

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17.-(1) Notwithstanding section 2, the board is repsonsible for the policing and maintenance of law and order in the municipality and *the members of the police force are subject to the government of the board and shall obey its lawful directions.*

(2) Every member of the police force of a municipality, however appointed, is, from and after the passing of a by-law establishing a board, subject to the government of the board to the same extent as if appointed by the board. R.S.O. 1980, c. 381, s. 17.

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20.-(1) Where a municipality that has established a police force does not have a board, the council shall appoint the members of the police force.

(2) Subject to clause 42(1)(g), the members of a police force referred to in subsection (1) shall consist of one or more constables and such other police officers, assistants and civilian employees as

the council considers adequate, and the council shall provide and pay for such accommodation, arms, equipment, clothing and other things as the council considers adequate.

• • •

23.-(1) *Every person employed in a police force shall be deemed to be a member thereof.*

PART VI

GENERAL

56. Every chief of police, other police officer and constable, *except* a special constable or a *by-law enforcement officer*, has authority to act as a constable throughout Ontario. R.S.O. 1980, c. 381, s. 56.

57. *The members of police forces appointed under Part II, except assistants and civilian employees, are charged with the duty of preserving the peace, preventing robberies and other crimes and offences, including offences against the by-laws of the municipality, and apprehending offenders, and commencing proceedings before the proper tribunal, and prosecuting and aiding in the prosecuting of offenders, and have generally all the powers and privileges and are liable to all the duties and responsibilities that belong to constables.* R.S.O. 1980, c. 381, s. 57.

58.-(1) *The Ontario Police Commission* or any member thereof designated by the chairman *may investigate*, inquire into and report upon the conduct of or the performance of duties by any chief of police, other police officer, constable, special constable or *by-law enforcement officer*....

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66.-(1) Every person appointed to be a chief of police, other police officer or constable shall before entering on the duties of his office, and every special constable when thereunto required, take and subscribe the following oath:

I, ..., do swear that I will well and truly serve Her Majesty the Queen in the office of constable (or as the case may be) for the ... of ... without favour or affection, malice or ill-will; and that, to the best of my power, I will cause the peace to be kept and preserved, and prevent all offences against the persons and properties of Her Majesty's subjects; and that, while I continue to hold the said office, I will, to the best of my skill and knowledge, discharge all the duties thereof faithfully according to the law. So help me God.

Sworn, etc.

(2) The oath of every chief of police, other police officer and constable of a municipal police force shall be deposited in the office of the clerk of the municipality or of the secretary of the board of the municipality for which he is appointed. R.S.O. 1980, c.381, s. 66.

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69.-(1) Subject to section 56, *a county court judge, a district court judge or a provincial judge may, by written authority, appoint any person to act as special constable for such period, area and purpose as he considers expedient.*

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(3) Every appointment as a special constable is subject to the approval of the Commission.

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(5) Every authority appointing a special constable shall require him to take and subscribe an oath similar to that set out in subsection 66(1).

70. *The council of any municipality or the trustees of any police village may appoint one or more municipal law enforcement officers who shall be peace officers for the purpose of enforcing the by-laws of the municipality or police village.* R.S.O. 1980, c. 381, s. 70.

From Regulation 791, R.R.O., 1980,

29. Except with the consent of the chief of police, granted in accordance with the by-laws of the board or council, as the case may be, no member of a police force shall engage directly or indirectly in any other occupation or calling, and he shall devote his whole time and attention to the service of the police force. R.R.O. 1970, Reg. 680, s. 29.

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QUALIFICATIONS

32. No chief of police, constable or other police officer shall be appointed to a police force unless he,

(a) is a Canadian citizen or a British subject;

(b) is eighteen years of age or over;

- (c) is certified by a legally qualified medical practitioner to be in good health, mentally and physically, and fit for duty as a member of a police force;
- (d) produces satisfactory proof of having successfully completed at least two years secondary school education or its equivalent; and
- (e) is of good moral character and habits. O. Reg. 970/74, s. 1.

UNIFORM AND EQUIPMENT

33. *All articles of uniform and equipment necessary for the performance of duty shall be provided by the municipality, but, where damage or loss occasioned by the fault of a member of a police force, the cost of replacement shall be borne by him. R.R.O. 1970, Reg. 680, s. 33.*

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OATH OF AUXILIARY MEMBER

35. The oath to be taken and subscribed to by an auxiliary member of a police force shall be in Form 3. R.R.O. 1970, Reg. 680, s. 35.

[emphasis added]

12. Section 14(1) of the *Police Act* provides that a police force in a municipality having a board of commissioners of police shall consist of, among others, assistants. Counsel for the employer argues that the by-law enforcement officers are "assistants" within the meaning of section 14(1) of the *Police Act* and are, therefore, members of the police force. Respondent counsel points to article 23(1) which provides that every person employed in a police force shall be deemed to be a member thereof.

13. Mr. Walter Ellicock, the manager of Metropolitan Investigation and Security (Canada) Ltd. (to be read as "Phillips Security Agency Inc." for the purposes of the instant decision) testified to the employment framework of the by-law enforcement officers. The Corporation of the City of Thunder Bay passed a by-law to regulate parking on the highways of the City of Thunder Bay. The by-law established parking meter zones and provides that parking meters will be established in those parking meter zones. It further stipulates that no person shall park a vehicle in one of those zones except in compliance with the by-law. Part II of the by-law entitled "ENFORCEMENT AND PENALTIES" provides in section 7(1)(a) that where a vehicle is found parked standing or stopped in contravention of the by-law, the "Police Officer, By-Law Enforcement Officer, Municipal Law Enforcement Officer or other person duly appointed to enforce this by-law" shall ticket the vehicle. The by-law then provides that the ticket should be delivered to the parking authority of the City of Thunder Bay.

14. The relevant provisions of the parking by-law are set out below:

THE CORPORATION OF THE CITY OF THUNDER BAY

BY-LAW NUMBER 158-1977

A By-law to regulate parking on the highways of the City of Thunder Bay.

WHEREAS Section 460(8) of the Municipal Act provides that the councils of all municipalities may pass by-laws for erecting, maintaining and operating on any highway or portion of a highway automatic or other mechanical meters or devices, with the necessary standards for the same, for the purpose of controlling and regulating the parking of any vehicle on the highway and measuring and recording the duration of such parking, for requiring drivers of every vehicle parked on such highway to make use of such meters or devices, and to pay for parking such vehicle on the highway a fee according to the amount or scale prescribed by the by-law and as measured by the meter or device, and for prohibiting parking of vehicles on such highway or portion of a highway unless such meter or device is made use of and such fee is paid, and for limiting the right of parking of vehicles on such highway to such drivers as do make use of such meters or devices and pay such fees.

• • •

PART I – PARKING METERS AND PARKING METER ZONES

1. Establishment of Parking Meter Zones

Subject to the provisions of The Municipal Act, R.S.O. 1970, Chapter 284, and amendments thereto, the streets or portions of streets more particularly set forth in Schedule “1” are hereby designated and established as Parking Meter Zones; . . .

2. Parking Time in Metered Zone

Legal parking time in the areas established or designated as Parking Meter Zones shall be as more particularly set forth in Schedule “2” hereto.

3. Method of Operation

(a) Parking meters shall be placed in all Parking Meter Zones as closely as is practicable to the individual parking spaces governed by such meters. . . .

• • •

4. Illegal Parking in Parking Meter Zones

No person shall park a vehicle on any street or part of a street designated as a Parking Meter Zone except in compliance with the provisions of this By-Law.

PART II – ENFORCEMENT AND PENALTIES

7. (1) (a) Where a vehicle is found parked, standing or stopped in contravention of the provisions of this By-law, the Police officer, By-law Enforcement Officer, municipal law enforcement officer or other person duly appointed to enforce this By-law so finding the vehicle shall place upon or attach to the vehicle a parking ticket in the form of a serially numbered notice stating:

- (i) The permit number and a concise description of the vehicle;
- (ii) That the vehicle is unlawfully parked, stopped or standing as the case may be;
- (iii) The date, time and place of the alleged offence;
- (iv) That the owner or operator thereof may make a voluntary payment in the manner set forth in Clause (c) hereof;
- (v) That in the event of his failure to make such payment a Summons will be issued under The Summary Convictions Act;
- (vi) The addresses of the Parking Authority payment depots.

(b) The ticket shall be completed in duplicate and the Police officer, By-law Enforcement Officer, municipal law enforcement officer or other person duly appointed to enforce this By-law shall attach one copy to the vehicle and deliver the other copy to The Parking Authority of The City of Thunder Bay.

• • •

15. To implement this by-law the City of Thunder Bay, at thirty month intervals, invites tenders for the supply of a complete parking meter patrol service. In 1976 Metropolitan Investigation and Security (Canada) Ltd. submitted the successful tender for the supply of the parking meter patrol service. In 1978 they again obtained the contract. Subsequently, however, presumably in 1980, the contract for the supply of the complete parking meter patrol service was given to Phillips Security Agency Inc., the respondent to the instant application for certification.

16. The form of tender for the supply of the complete parking meter patrol service for the City's Parking Authority is established by the City of Thunder That form was submitted into evidence and reads in part as follows:

FORM OF TENDER 26/81

SUPPLY A COMPLETE PARKING METER PATROL SERVICE

- FOR THE PARKING AUTHORITY -

I/We, the undersigned, do hereby tender and offer to enter into contract with the Corporation of the City of Thunder Bay for the SUPPLY OF COMPLETE PARKING METER PATROL SERVICE in accordance with the attached "City Standard Terms and Conditions for Tenders and Contracts" and all the specifications and terms of the Corporation's tender which are set forth below and attached at the prices indicated in the space provided for that purpose, all to the entire satisfaction of the City Director-Administrative Services or his appointed agent.

I/We estimate that Patrol Service can be started within ____ days after notification has been received of the award of tender.

I/We understand that the terms of the contract shall be for thirty months at 5,000 hours (more or less) as stated in the paragraph "Length of Contract, Renewal, Termination", on page three.

I/We hereby submit our charge for Patrol Service, including supervision, for the total estimated hours for the term of two years will be \$_____ per hour, per patrol officer, and \$_____ per hour, per patrol officer in vehicles.

• • •

SPECIFICATIONS & CONDITIONS - IN GENERAL

The object of this tender is to provide uniformed parking meter patrol service for a period of thirty months for the City of Thunder Bay for all meters under the control of the City Park Authority.

IN DETAIL

PERSONNEL - A *QUALIFIED SUPERVISOR* shall be supplied who will be directly responsible to the Manager-Secretary of the Parking Authority.

METER ATTENDANTS who may be either male or female shall be of good health, capable of understanding by-laws and regulations related to parking and traffic, and shall be able

- (a) to deal with the public efficiently in an authoritative yet courteous manner

- (b) each successful applicant must pass a driving test using a 3-wheeled Cushman patrol cart as supplied by the Parking Authority under this contract.
- (c) ALL applicants are subject to approval by the Parking Authority prior to their being retained by the successful tenderer.

To provide *TWO ONLY PATROL OFFICERS IN THE NORTH AND TWO IN THE SOUTH DOWNTOWN CORES* to patrol meters between the hours of 9:30 a.m. and 5:30 p.m. daily except Sundays and City claimed holidays. All officers to be in uniform attire. While operating the Cushman Carts, the officers *must* wear an approved "police style" crash helmet. All officers are to be sworn in as by-law enforcement officers by the Clerk of the City of Thunder Bay.

To provide ONE ATTENDANT in each of two parking garages located in the KESKUS-SHOPPING MALL, and ONE IN THE VICTORIA PARKADE. Responsibility of the attendant will be to collect monies for parking, maintain a weekly collection report and prepare deposits. The attendant in C-1 at Keskus will also be responsible for accepting payments for monthly parking and fines and making daily report sheets on these. Hours of coverage will generally be:

8 A.M. - 7 P.M. MONDAY - SATURDAY
7 P.M. - 9:30 P.M. THURSDAY AND FRIDAY

Relief time will be the responsibility of the supplier.

A courier system must be provided by the supplier to transport the daily deposit from C-1 and C-2 garage to the City's bank. The supplier must also deposit the receipts from the Victoria Parkade in the City's bank.

The Parking Authority will provide four (4) Cushman motorized patrol carts. Two (2) will be stored in the Keskus Garages and two (2) in the Victoria Parkade. The Parking Authority will provide all insurance and maintenance on these units. The successful tenderer *must* provide a minimum of \$3,000,000.00 liability insurance on these units, naming the City as an insured party. The successful tenderer must also assume the cost to repair any damages to the units resulting from negligent operation by one of their security personnel.

The Parking Authority will provide a working schedule which it would like to discuss with the successful tenderer.

The following schedule for rates of pay must be adhered to:

1981 – Minimum pay per
hour per officer \$5.00

Jan. 1, 1982 – Minimum pay per
hour per officer \$5.50

Jan. 1, 1983 – Minimum pay per
hour per officer \$6.05

The form of tender set out above is the one that was applicable to Phillips Security Agency Inc. The one responded to by Metropolitan Investigation and Security (Canada) Ltd. leading to their contract for the supply of the parking meter patrol service is only slightly different.

17. Certain fundamental conditions of employment are established by the terms of the tender set by the City of Thunder Bay: the company supplying the parking meter patrol service must have a qualified supervisor who will be directly responsible to the manager-secretary of the Parking Authority. The applicants for meter attendants are subject to the approval of the Parking Authority. The officers must be in uniform and they are to be sworn in as by-law enforcement officers by the clerk of the City of Thunder Bay. The tender further establishes the time during which the patrol officers will patrol the meters as well as their minimum rate of pay. With respect to discharge, Mr. Ellicock states in his evidence that if the Parking Authority does not like one of the by-law enforcement officers and were to recommend that she be removed from the job, she would be.

18. Mr. Ellicock testified that when his company first got the contract from the City for the supply of the parking meter patrol service, Mr. Brown, the manager-secretary of the Parking Authority, instructed the by-law enforcement officers hired by Metropolitan on their powers and duties. It would appear that at the same time they were all sworn in as by-law enforcement officers.

19. The Board concludes on the evidence that the persons hired as meter attendants by Metropolitan take the following oath administered by someone acting on behalf of the City. The following oath was submitted into evidence by counsel for Phillips Security Agency Inc., and is virtually identical to the one filed as an exhibit in the *Metropol* case.

BY-LAW ENFORCEMENT OFFICER

I, _____, do swear that I will well and truly serve Her Majesty the Queen in the office of By-law Enforcement Officer for the enforcement of all City of Thunder Bay By-laws for the Municipality of the City of Thunder Bay without favour or affection, malice or ill will and that while I continue to hold the said

office, I will, to the best of my skill and knowledge discharge all the duties thereof faithfully, according to the law: – SO HELP ME GOD

Sworn before me this ____ day of _____ 1981

H.T. Kirk
City Clerk

Presumably this oath was taken pursuant to the parking by-law which requires law enforcement officers to be “sworn in” by the Clerk of the City of Thunder Bay. The oath taken by the by-law enforcement officers, however, is significantly different from the oath set out in section 66 of the *Police Act*, which in any event is applicable only to a chief of police, other police officer, constable, and special constable. As well, the oath taken by the by-law enforcement officer is different from the oath taken by an auxiliary member of a police force as referred to in section 35 of the Regulation 791. There is no oath of office specially established by the *Police Act* either for by-law enforcement officers or “assist“assistants”.

20. On a number of occasions the Board has been called on to interpret section 2(d) of the *Labour Relations Act* as well as its predecessor sections. In *Canadian Westinghouse Co. Ltd.* 47 CLLC ¶16,492 the union applied to be certified for all watchmen in the employ of the respondent company. Section 10 of the Act [now section 2(d)] provided that the Act was not applicable to “members of any police force”. The persons the union had applied to represent included special constables appointed under the *Constables Act*, R.S.O. 1937, c. 140 [repealed by the *Police Act*, 1946, c.72]. In concluding that the special constables were not excluded from the coverage of the Act, the Board reasoned as follows at p. 1227 of its decision:

When the case came before the Board, there was some question in our minds whether the status of those watchmen who have been sworn in was such as to bring them within the terms of section 10 of the *Labour Relations Board Act* [Ont. ¶10,210]. That section provides that the Act is not applicable to “members of any police force” (among others). We believe that the exclusion was intended to apply only to public police forces established under provincial authority, and not to individuals appointed as special constables for the specific purpose of acting as such under the instructions of a private employer. We do not concede that because the appointments in question are neither limited in point of time to the period of employment of the appointee with the respondent company nor limited territorially to the premises of the respondent company, the individuals concerned are members of a police force. Accordingly, we find that the employees concerned are not members of a police force within the meaning of the *Labour Relations Board Act* and are therefore not excluded from the operation of the Act.

Similarly, in *Ford Motor Company of Canada Limited*, [1959] OLRB Rep. May 68 the Board concluded that employees of the respondent who were sworn in as special

constables were not members of a police force within the meaning of section 2(c) (now 2d) of the Act. (See also *Walker Metal Products Limited*, [1963] OLRB Rep. Aug. 276.)

21. In *The Police Commission of the City of Sudbury* 60 CLLC ¶16,161 the union applied to represent “all office employees of The Police Commission of the City of Sudbury”. The respondent, however, objected to the application on the ground that the persons concerned were members of the police force and thus excluded from the coverage of the Act. In accepting the respondent’s position the Board reasoned as follows at p. 850:

Under the *Police Act*, a police force is differently composed in a municipality having a board of commissioners of police than in a municipality not having such a board. Where there is a board of police commissioners, section 12 of *The Police Act* provides that the police force shall consist of “a chief constable and as many constables and other police officers and such assistants as the council may deem necessary, but not fewer than the Board reports to be required”. In a municipality not having a board, the police force consists of “one or more constables or other police officers”. As Anglin J. said in *Williams v. Box*, (1910) 44 S.C.R. 1, “to treat any part of a statute as ineffectual, or as mere surplusage, is never justifiable if any other construction be possible. The rejection or excision of a word or phrase is permissible only where it is impossible otherwise to reconcile or give effect to the provision of the Act”. Applying this canon of construction here, the phrase “such assistants” must be taken to mean persons other than a chief constable, constables or other police officers. Although the term “assistants” is not defined in *The Police Act*, it is not without significance, in the light of sections 13 and 17 of that Act, that the employees concerned in this application were appointed by the board of police commissioners and that the estimates submitted by that board to the council included estimates for the remuneration and other expenses of the civilian employees of the respondent. In our opinion the word “assistants” in section 12 of *The Police Act* must be construed to include the office employees of the respondent whom the applicant seeks to represent in these proceedings and we find accordingly that these employees are members of a police force within the meaning of the *Police Act*.

[emphasis added]

In *The Board of Commissioners of Police of the City of London*, [1961] OLRB Rep. July 135 the Board, relying on its decision in *The Police Commission of the City of Sudbury*, *supra*, held that the garage employees of the respondent were “assistants” of the police force and therefore members of a police force for the purposes of the *Labour Relations Act*. (See also *The Corporation of the City of Cornwall*, [1969] OLRB Rep. June 379 where the Board held that by virtue of section 2(d) of the Act employees of the police department were not eligible for inclusion in the bargaining unit).

22. In *The Board of Commissioners of Police for the City of Windsor*, [1964] OLRB Rep. Feb. 650, the Board considered whether the respondent's garage employees who were responsible for repairing and servicing police vehicles were members of the police force. These employees were appointed by the board of police commissioners and were included in the budget estimates submitted by the Board to the municipality. Following the Board's earlier decisions in *The Police Commission of the City of Sudbury*, *supra*, and *The Board of Commissioners of Police of the City of London*, *supra*, the Board held that the garage employees of the Board were "assistants" within the meaning of the *Police Act* and were, therefore, members of a police force and excluded from the scope of the *Labour Relations Act*.

23. On appeal, the High Court of Justice overturned the Board's decision: *Regina v. Ontario Labour Relations Board, Ex parte Canadian Union of Public Employees*, Local 543, [1964] 2 O.R. 260. At pp. 263-64 of its decision the Court reasoned as follows:

The question to be decided here is "Are the employees in this case members of a police force within the meaning of such Act and by reason thereof excluded from the application of The Labour Relations Act". If they are to be so regarded as such members, it must be by virtue of the words "such assistants".

It is acknowledged that such employees are employed by the Board and paid by it from funds provided by the City but that their work is confined to that of motor mechanics and that they are not authorized nor do they attempt to exercise the powers or functions of a police officer or constable. The words "such assistants" should be interpreted *ejusdem generis* with the words "constables and other police officers". The purpose of excepting a member of a police force from the provisions of the *Labour Relations Act* must be that such officer or constable shall always be free to fulfil his duties in the maintenance of law and order; as the only part that the employees herein play in such a responsibility, is the maintenance of the vehicles used by police officers, it would appear to be beyond the purposes of the Act to exclude them therefrom.

Police officers are not in any event employees of the municipality which engages or pays them but are public servants or officers of the Crown sworn to preserve the peace and exercise duties on their own responsibility free of interference from the municipal authorities: *Bruton v. Regina City Policemen's Ass'n*, Local No. 155, *supra*; *The King v. Labour Relations Board (N.S.)*, [1951] 4 D.L.R. 227, 29 M.P.R. 66; *A.-G. N.S.W. v. Perpetual Trustee Co.*, [1955] A.C. 457.

The sections of the Act above quoted are helpful in the interpretation of the word "assistants" and go to show that the employees in the present case are not members of a police force. *One would not refer to the hiring of such mechanics as being*

“appointed by the board” as in s. 14; there would be no occasion for a Board to make “regulations for the government” of mechanics as in s. 15 nor would they ordinarily be “subject to the government of the board” as provided by s. 16(1) above. Section 47 charges members of police forces with the duty of preserving the peace, preventing robberies and other crimes and offences, including offences against the by-laws of the municipality, apprehending offenders, and laying information before the proper tribunal, and prosecuting and aiding in the prosecuting of offenders, and have generally all the powers and privileges and are liable to all the duties and responsibilities that belong to constables. Such obligations are entirely foreign to the mechanics in this case.

The word “assistants” is defined in the Shorter Oxford Dictionary as, *inter alia*, “one who is present, one who takes part; a helper”. The Webster Dictionary defines the word as “one who assists or serves in a subordinate position; a helper”. Such word does not normally convey a meaning which would justify regarding a mechanic working in such a garage as an “assistant” to the police officer. *If the Legislature had meant such a group of employees to be excluded from the Act, it would have used more apt language, such as the word “employees”.*

I have come to the conclusion that the employees in question are not “assistants” within the meaning of s. 13 of the *Police Act* and consequently are not members of the police force within the meaning of such Act; it follows that they are not excluded from the provisions of the *Labour Relations Act*,

[emphasis added]

Subsequent to this decision the *Police Act* was amended by s. 6(1) of *The Police Amendment Act, 1965*, S.O. 1965 c., 99 and the following section was added as section 22 [now section 23(1)] of the Act:

Every person *employed* in a police force shall be deemed to be a member thereof.

[emphasis added]

This amendment would appear to be responsive to the Court’s statement that if the Legislature had intended to exclude people such as the garage mechanics it would have used a word such as “employees”. Accordingly, the legislative amendment breathes life back into the decision of the Board that was quashed by the Court in *Regina v. O.L.R.B., ex parte C.U.P.E., supra*, as well as the Board’s earlier decisions which were affirmed in that case.

24. A number of decisions referred to the Board by counsel for the respondent deal solely with the question of whether a police officer should be considered a

municipal employee and not with the issue before us of whether a particular group of persons are members of a police force. (See, for example, *Re St. Catharines Police Association and Board of Police Commissioners for the City of St. Catharines* (1970), 15 D.L.R. (3d) 532 (Ontario High Court) and *The King v. Labour Relations Board* (N.S.), [1951] 4 D.L.R. 227 (N.S.S.C.).

25. We turn to determine whether the by-law enforcement officers in dispute are “assistants” within the meaning of the *Police Act* and therefore members of a police force for the purpose of section 2(d) of the *Labour Relations Act*.

26. Section 2(1) of the *Police Act* imposes a responsibility on every city to provide and maintain an adequate police force. Section 8(1) of the Act requires that every municipality that provides and maintains a police force and that has a population of over 15,000 have a board of commissioners of police. The evidence of Mr. Ellicock establishes that the City of Thunder Bay does in fact have a board of commissioners of police.

27. Section 15 of the *Police Act* provides that “the members of the police force in a municipality having a board [of commissioners of police] shall be appointed by the board”. The by-law enforcement officers in dispute, however, were not appointed by the Board. They were hired by Phillips Security Agency (subject to the approval of the City’s Parking Authority) to fulfill a contract that Phillips Security had entered into with the City of Thunder Bay for the supply of a parking meter patrol service. The circumstances of this matter, therefore, are readily distinguishable from the facts in *The Police Commission of the City of Sudbury, supra*, where the employees who were found by the Board to be “assistants” had been appointed by the board of commissioners and police. In *Reference Re Power of Municipal Council to Dismiss a Chief Constable or other Police Officer Without a Hearing*, (1915) 7 D.L.R. (2d) 222 the Court of Appeal of Ontario considered this section of the *Police Act* and stated at p. 223:

The members of a police force in a municipality having a Board [of Commissioners of Police] *must* be appointed by the Board. . . .

[emphasis added]

The by-law enforcement officers in question were not appointed by the board of commissioners of police. Accordingly, having regard to the clarity of section 15 of the *Police Act*, it would appear that on this basis alone the by-law enforcement officers cannot be considered members of the police force for the purpose of section 2(d) of the *Labour Relations Act*. Although section 20(1) of the *Police Act* anticipates a municipal council appointing members of a police force, the section is only applicable to a municipality (unlike the City of Thunder Bay) that does not have a board of commissioners of police.

28. Numerous other sections of the *Police Act* support the conclusion that the by-law enforcement officers in dispute are not members of the police force. Section 14(1) of the *Police Act* provides that a police force in a municipality having a board “*shall consist of a chief of police and such other police officers and such constables, assistants and civilian employees as the board considers adequate, and shall be provided with*

such accommodation, arms, equipment, *clothing* and other things *as the board [of commissioners of police] considers adequate*" (emphasis added). Counsel for Phillips Security Agency maintains that the traffic by-law enforcement officers fall into the category of "assistant". There is no evidence, however, to suggest that the board of commissioners of police directed its mind in any way to the appointment of the by-law enforcement officers or considered whether they should be included in the police force. The determination of the number of meter by-law enforcement officers required was made by the City as reflected and set out in the form of tender established by the City. Moreover, there is no evidence to suggest that the by-law enforcement officers are supplied with clothing or equipment deemed adequate by the board of commissioners of police as would be the case pursuant to section 14(1) of the *Police Act* if they were members of the police force. Instead, as spelled out in the tender document, they are supplied with the clothing and equipment deemed necessary by the City of Thunder Bay.

29. Section 14(2) requires every board of commissioners of police to submit to the council its estimates of all monies required for the year to pay the remuneration of the members of the police force. Unlike the circumstances in *The Police Commission of the City of Sudbury, supra*, *The Board of Commissioners of Police of the City of London, supra*, and *The Board of Commissioners of Police for the City of Windsor, supra*, where the employees in question were found to be "assistants", there is no suggestion in the instant matter that the board has budgeted remuneration for the by-law enforcement officers or submitted an estimate to cover them. The by-law enforcement officers are paid by Phillips Security Agency in accordance with the minimum rates of pay established by the City. Input by a council is provided for in section 14(3) of the *Police Act*. Such input, however, occurs when the council does not agree with the estimates of the board of commissioners of police. There is no evidence before this Board of any such disagreement between the two bodies.

30. Section 20(2) of the *Police Act* refers to the police force consisting of such "assistants" (among others) as the "council considers adequate" and states that "the council provide" such pay and equipment as the "council considers adequate". As clearly stated in section 20(1), however, these provisions are only applicable to those municipalities, unlike the City of Thunder Bay, that do not have a board of commissioners of police.

31. Section 17(1) of the *Police Act* provides that "the members of the police force are subject to the government of the board [of commissioners of police] and shall obey its lawful directions." There is nothing in the evidence to establish that the by-law enforcement officers receive any direction whatsoever from the board of commissioners of police or even have any contact with it. As reflected by the form of tender issued by the City, it is the City, not the board of commissioners of police that broadly establishes such things as the by-law enforcement officers' hours and days of work, their clothing requirements and their minimum wages. This Board cannot conclude on the evidence that the by-law enforcement officers in dispute are subject to government of the board of commissioners of police within the meaning of section 17 of the *Police Act*, thus further supporting the conclusion that they are not members of the police force for the purpose of section 2(d) of the *Labour Relations Act*.

32. Counsel for Phillips Security maintains that the persons in dispute fall into that category of the police force described in section 14(1) of the Act as "assistants". It is interesting, however, that section 57 of the *Police Act* provides that,

The members of police forces appointed under Part II, *except assistants* and civilian employees, are charged with the duty [among other matters] of ... preventing ... offences against the by-laws of the municipality....

[emphasis added]

Clearly the by-law enforcement officers in issue are responsible for preventing offences against the City's parking by-law. If they were members of the police force, therefore, there may be some questions as to whether they would fall into the category of "assistants" as argued by the respondent.

33. Sections 56 and 58(1) of the *Police Act* specifically refer to by-law enforcement officers and section 70 refers to municipal law enforcement officers:

Section 56

Every chief of police, other police officer and constable, *except* a special constable or a *by-law enforcement officer*, has authority to act as a constable throughout Ontario.

Section 58(1)

The Ontario Police Commission or any member thereof designated by the chairman *may investigate, inquire into and report upon the conduct of or the performance of duties by any* chief of police, other police officer, constable, special constable or *by-law enforcement officer*, the administration of any police force, the system of policing any municipality, and the police needs of any municipality,

- (a) *at the request of the council of any municipality*, in which case the municipality, unless the Solicitor General otherwise directs, shall pay the cost of the investigation, including the cost of reporting and transcribing the evidence; or
- (b) without the request of the council of a municipality, in which case the cost of the investigation, including the cost of reporting and transcribing the evidence, shall be paid out of the Consolidated Revenue Fund.

Section 70

The council of any municipality or the trustees of any police village may appoint one or more municipal law enforcement officers who

shall be peace officers for the purpose of enforcing by-laws of the municipality or police village.

[emphasis added]

Standing on their own these references do not establish that every by-law enforcement officer, however appointed, is a member of a police force. In Board's opinion, section 70 does not indicate that when a city council appoints a "municipal law enforcement officer" that person becomes a member of the police force. Rather the provision enables the council of a municipality to appoint persons who are not members of the police force as municipal law enforcement officers for the purpose of enforcing the by-laws of the municipality. Perhaps the City of Thunder Bay may be viewed as having taken this action when it called for tenders for the supply of a full meter patrol service and swore people in as by-law enforcement officers. As evidenced by section 57 of the *Police Act*, persons who are clearly members of the police forces are also charged with preventing offences against the by-laws of the municipality. It does not follow, in other words, that the failure of a City to appoint its own by-law enforcement officers means that a City's by-laws go unenforced. In our view, the exercise of the right bestowed on a municipality through section 70 of the *Police Act* to itself appoint municipal law enforcement officers does not automatically render those appointees members of the municipal police force.

34. The Board's interpretation of section 70 of the *Police Act* is supported by section 3 of that Act. Section 3(1) provides that the O.P.P. force is not responsible for policing any part of Ontario where a municipal police force is maintained. It is responsible for policing those parts of Ontario where there are no municipal police forces. Subsection 2. of section 3 stipulates, however, that municipal law enforcement officers, e.g. those appointed pursuant to section 70 of the *Police Act*, shall not be deemed to be a municipal police force for the purposes of responsibilities of the O.P.P. The appointment of by-law enforcement officers by a municipal council does not, therefore, standing alone, render them part of a municipal police force.

35. Moreover, while sections 56 and 58 refer to by-law enforcement officers they do not, in this Board's opinion, suggest that the persons in dispute are members of a police force. Section 56 simply provides that by-law enforcement officers do not have the authority to act as constables throughout Ontario. Section 58 stipulates, in part, that at the request of the council of a municipality, (which under section 70 has the authority to appoint by-law enforcement officers) the Ontario Police Commission, at the expense of the City, may investigate the conduct of a by-law enforcement officer. That the conduct of a by-law enforcement officer appointed by a municipal council may be investigated by the Ontario Commission of Police does not itself make that person a member of a police force for the purpose of section 2(d) of the *Labour Relations Act*.

36. Counsel for Phillips Security Agency Inc. relied particularly on section 23(1) of the *Police Act* to argue that the by-law enforcement officers are members of a police force:

23.-(1) Every person employed in a police force shall be deemed to be a member thereof.

It is abundantly clear on the evidence, however, that the by-law enforcement officers in dispute are not employed *in* a police force. Apart from being informed as to which streets are to be kept open during snow removal, they have no contact with the police in the regular performance of their work. The by-law enforcement officers in dispute are employed by Phillips Security to perform a contract for the City of Thunder Bay to supply a meter patrol service. Unlike the circumstances in *The Police Commission of the City of Sudbury*, *The Board of Commissioners of Police of the City of London* and *The Board of Commissioners of Police for the City of Windsor*, they are not employed either in or by a police force. Accordingly they cannot be deemed to be a member thereof by virtue of section 23(1) of the *Police Act*.

37. For all of the reasons set out above the Board concludes that the by-law enforcement officers for whom the union seeks to be certified are not members of a police force within the meaning of section 2(d) of the *Labour Relations Act* and may therefore be the subject of an application for certification brought before this Board.

38. The Board finds all employees of the respondent employed in the City of Thunder Bay, other than those employed as guards protecting the property of employers, save and except supervisors, persons above the rank of supervisor and office staff, constitute a unit of employees the respondent appropriate for collective bargaining.

39. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit at the time the application was made, were members of the applicant on October 19, 1981, the terminal date fixed for this application and the date which the Board determines, under Section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

40. Accordingly, a certificate will issue to the applicant.

2733-81-U Isabelle Bastien, Complainant, v. International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, and its Local 2098, Respondent, v. **Seagram Company Ltd.**, Intervener

Duty of Fair Representation – Unfair Labour Practice – Union raising employer’s error in filling of job vacancy – Employer accepting error without raising timeliness of grievance – Rectification of error causing complainant to lose her position – Whether representation given in complainant’s grievance inadequate – Whether breach of duty of fair representation

BEFORE: G. Gail Brent, Vice-Chairman.

APPEARANCES: *P.J. Ducharme for the complainant; M. White and J. Beneteau for the respondent; Martin Breshamer for the intervener.*

1. The complainant has complained that she was dealt with by the respondent contrary to section 68 of the Act.

• • •

4. At all material times, the complainant was employed by Seagram Company Ltd. in Amherstburg, Ontario. On June 12, 1980 her name appeared on a list of employees to be laid off effective after the week ending June 15, 1980. On June 13, 1980 a notice of vacancy for a mini computer operator job was placed on the employer’s bulletin board. The other jobs which were also to become vacant because of the layoff were also posted. On the same date a notice was posted by the employer covering the mini computer job, along with other jobs. That notice indicated the jobs would be reposted and that the employee with most seniority would remain on the job until the new applicant was selected and trained. Accordingly, the complainant remained as engineering clerk and S. Paquette remained as mini computer operator, and neither was laid off.

5. On June 13, prior to the date that her layoff was to take effect, the complainant applied for the mini computer job and other jobs which had been posted as vacant that day. Other clerical employees who had been affected by the layoff notice also applied for the clerical jobs which were to become vacant.

6. The complainant testified that she had some concerns about the legitimacy of bidding for these jobs while she was subject to a formal notice of layoff but still retained in the plant, so she went to a union membership meeting and asked Mr. Beneteau, the president of the local, if she could bid on the jobs. She said that Mr. Beneteau answered that as long as the employees were in the plant they could bid. Mr. Beneteau had no memory of the question from the floor; however the minutes for that meeting indicate that the complainant asked, “if we could bid on our jobs that were posted because of a layoff” and Mr. Beneteau answered, “If you are still working in the plant at the time the jobs goes up you can put in for it.” Mr. Beneteau said that, when he heard the minutes, he would construe the reference to “our jobs” as clerical jobs generally and not to the very jobs which were being vacated by the layoff. He explained

that in the previous collective agreement clerical employees had "super seniority" and were never subject to layoff, and that this would have been the first layoff which would have affected them.

7. The complainant said that she relied on Mr. Beneteau's response as confirming that she could apply for one of the clerical jobs which was being vacated by the same layoffs which affected her.

8. While the Board does not consider it necessary to resolve exactly what was meant by the question and the response, I must acknowledge that both are ambiguous and that it would be reasonable for someone to misunderstand both the question and the answer.

9. The complainant was awarded the mini computer operator job on June 26, 1980.

10. In October, 1981, a situation arose which caused Ms. Paquette to attend a local union executive committee meeting along with the steward in the bottling area. Any member of the local who believes that he or she has a potential grievance can attend such a meeting to discuss it with the executive. No member of the executive committee was put on notice that Ms. Paquette was going to attend the meeting or that she had any particular problem to discuss.

11. At that meeting Mr. Beneteau clearly concluded, for the first time, that the collective agreement had been violated in June, 1980 when the complainant had applied for and been awarded Ms. Paquette's mini computer job. It was the conclusion of the executive that the union should ask the employer to correct the situation by returning to the June, 1980 position, and Ms. Paquette was told by Mr. Beneteau that she had "a legitimate grievance". The result of the success of Ms. Paquette's claim would be that the complainant would lose the mini computer job.

12. The question of the time which had elapsed since June, 1980 was explored at great length with Mr. Beneteau. It is clear that nobody raised the issue of any possible time bar at that meeting. That is most surprising; one would have expected the employer to raise the issue at the first meeting with the union, and the union would have looked quite foolish in Ms. Paquette's eyes after telling her that she had a legitimate grievance. Mr. Beneteau appears to have assumed that the employer's error in interpreting the collective agreement had just come to Ms. Paquette's attention or, as he said, why would she have waited a year and a half to complain.

13. I do not think that the union's actions thus far can be faulted insofar as section 68 is concerned. It is merely in possession of a complaint concerning what it regarded as a clear violation of the collective agreement. In its role as guardian of the collective agreement, the union has a duty to all of its members to ensure that the agreement is complied with. There are times when this role, and its duty to the membership in general, involves the union in what appears to be activity against the personal interest of a particular employee. Such an appearance should never be mistaken as a breach of the union's duty of representation under section 68 of the Act. If there is any fault to be found at all, it is in Mr. Beneteau's assertion to Ms. Paquette that she had a legitimate

grievance before he knew whether the company would press any objection on the ground of timeliness.

14. On the 19th of October, 1981, there was a regularly scheduled union/management meeting during which the problem concerning Ms. Paquette and the complainant was discussed. It is clear from the evidence that the employer did not indicate that it considered any claim barred by the time limit provisions of the collective agreement. It is from the employer, and the employer alone that one would expect such an objection to originate. It is not reasonable to expect the union to tell the employer what defences it may have to any claim that the collective agreement was violated. It is also clear that the employer agreed with the union that there had been a mistake made in the interpretation of the collective agreement, and that the complainant should not have been awarded the mini computer operator job in June, 1980. The only matter discussed at any length appears to have been how to remedy the situation. The union's position was that it would be best to return to the status quo as of June, 1980 and the employer agreed.

15. Naturally, that was not the only possible solution to the problem; however, it is a reasonable solution and it was agreed upon by both parties to the collective agreement. It is not the function of this Board to second guess the wisdom of such an agreement. Under the circumstances it cannot be said that the union was motivated by any bad faith toward the grievor or that it was attempting to do any more, or less, than to correct a misinterpretation of the collective agreement in what it believed was the best way possible. There is no doubt from the evidence that it appreciated that the complainant would be upset or might consider the move to be unfair, but that it was willing to take the consequences of its decision.

16. The complainant's evidence makes it clear that she knew of the union/management meeting of October 19th, that she spoke to Mr. Beneteau before that meeting, and that she was aware that the decision regarding the mini computer job would be made then by the employer. It is also clear that she was made aware of the decision, because she filed a grievance after the notice was placed on the bulletin board acknowledging the return to the June 1980 positions.

17. The next step in the proceedings causes the Board some concern. The grievor was summoned to a grievance meeting to receive the employer's answer to her grievance. Mr. Bailey, a steward in the bottling department, would normally have accompanied a grievor to the meeting to represent the grievor's and the union's position. Mr. Bailey had been the steward who had pressed for the correction of the situation along with Ms. Paquette. It was felt, apparently by both Mr. Bailey and Mr. Beneteau, that it would be improper for Mr. Bailey to represent the grievor in this case. The Board cannot fault that decision in any way. Mr. Beneteau designated Ms. Lorna Beaudoin, the recording secretary, to go to the meeting because she was a member of the executive and had attended both the union committee meeting and the union/management meeting where the matter had been discussed. Mr. Beneteau said that he believed that Ms. Beaudoin would be the best available person to stand in for Mr. Bailey because she was familiar with the background. That decision appears to be a reasonable one on its face and does not of itself constitute any refusal to represent the complainant. Unfortunately, Ms. Beaudoin, from her own evidence, would not be considered to be a particularly

able representative. She had never been at a grievance meeting; she had not talked to the complainant about the grievance; and she was reluctant to go to the meeting. It appears that Ms. Beaudoin did point out to the employer the length of time that had passed; however, the employer denied the grievance.

18. The complainant knew the grievance had been denied, and she also knew that the position taken by the employer was one which the union considered to be correct and consistent with the collective agreement. It would be a difficult position for any person who had felt wronged to be in, particularly when she understood Mr. Beneteau to have sanctioned her application for the mini computer job in June, 1980.

19. Following the grievance meeting, the grievor contacted Mr. Mike White, an international representative of the union. He agreed to meet with her, and she explained to him her complaint about Mr. Beneteau and about the way she had been represented. Mr. White arranged a meeting with the complainant, Mr. Beneteau, and some others. At that meeting the union's position was explained to the complainant and Mr. Beneteau said that he had the impression that the complainant was satisfied with the explanation. She denied ever saying she was satisfied.

20. It should be pointed out that the complainant was specifically informed of her right to proceed further in the grievance procedure and of her rights under the union's constitution. At no time did she pursue these avenues.

21. On November 2, 1981, when the grievor had a meeting with Mr. Beneteau, it is clear that Mr. Beneteau left that meeting believing that the complainant had accepted the union's interpretation and was only concerned because, in her view, she had not really been returned to the status quo. The Board accepts his evidence that, at that meeting, she gave him two typewritten documents (Exhibits 2A and 2B), and the Board can appreciate that anyone reading the passage:

"I am not contending that the job be awarded to me as an applicant, since I was on layoff and unable to apply for same job."

would conclude that the complainant was accepting the return to the status quo. The Board can also appreciate that anyone reading the rest of the two documents would have some difficulty ascertaining whether the complainant was satisfied or not. In any event, she took no steps to try to have her grievance proceed through the grievance procedure, and her silence in that regard would tend to reinforce the view that she was satisfied with the answer.

22. On November 9, 1981, the complainant did write to Mr. Robert White, the union's Canadian director, who forwarded her letter to Mr. M. White for reply. He replied in December (Exhibit 1), setting out at length the reasons for the union's actions and again informing her of her right to go to the membership if she was not satisfied with the union's actions.

23. The union's duty is set out in section 68 as follows:

"A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act

in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.”

24. It is clear that this case is one where both the union and the employer acknowledge that there had been an error made by the employer in the interpretation of the collective agreement. It cannot be seriously argued that a union should not point out such an error to an employer when the rectification of the error would result in some degree of personal hardship or loss to an employee. I do not consider that a union is in breach of section 68 when it acts to correct a mistaken interpretation of the collective agreement. The duty of representation in section 68 was not intended to keep a union from acting as guardian of the collective agreement.

25. The complainant’s counsel stressed that Ms. Paquette’s complaint should not have been pursued because it was untimely. There is no evidence before me to suggest that the union regarded it as timely. That may have been an error in judgment on the part of the union; however, that would not of itself suggest behaviour which was arbitrary, discriminatory or in bad faith. In any event, the employer never raised the issue of the timeliness of any potential grievance, and it is up to the employer to raise the matter of timeliness. Its failure to do so could have been construed as a waiver of those procedural requirements of the collective agreement.

26. Once the error was acknowledged by the employer, it proceeded to reach an agreement with the union concerning the most acceptable way to rectify the situation. It is impossible to fault the union for entering into those discussions and for reaching an agreement satisfactory to both parties to the collective agreement. At that stage of the proceedings, it was not a case of the union arbitrarily choosing the interests of one employee over another, but rather, a case of the union attempting to preserve the integrity of the collective agreement in the interest of the bargaining unit as a whole.

27. If there is fault to be found, it is in the manner in which the complainant was represented at the grievance meeting. The Board does not fault the decision to have someone other than Mr. Bailey represent the complainant; however, it is clear that Ms. Beaudoin felt inadequate and uncomfortable in her role, and that the complainant felt unrepresented. It is unfortunate that this occurred, but it would not have itself been fatal to the success of the grievance had the grievance progressed through the grievance procedure and thence to arbitration. There is no evidence to suggest that the complainant was ever discouraged from pursuing any of the remedies available to her through the grievance procedure. There is no evidence of any refusal to process a grievance or of any refusal to provide access to the union’s internal review procedures.

28. All things considered, the Board must conclude that there is no evidence from which it can conclude that the union failed in its duty of representation toward the complainant. That is not to say that the complainant’s position should not be sympathized with to some extent. It would be impossible not to acknowledge that, even though there has been no violation of the Act, she would naturally feel somewhat confused and perhaps even betrayed by what occurred.

29. For all the reasons set out herein, the complaint is dismissed.

2531-81-U Office and Professional Employees International Union, Complainant, v. **Union Du Canada Assurance – Vie**, Respondent

Natural Justice – Practice and Procedure – Unfair Labour Practice – *Statutory Powers Procedure Act* imposing mandatory duty to provide written reasons upon request – Board having discretion on extent of reasons depending on circumstances – Board policy on written reasons for its decisions

BEFORE: M. G. Picher, Vice-Chairman, and Board Members W. H. Wightman and S. Cooke.

APPEARANCES: *Cathy Lace for the applicant; R. E. Shibley, Q.C., for the respondent.*

DECISION OF THE BOARD; October 14, 1982

1. On April 27, 1982 the Board issued a remedial order in this complaint. Counsel for the union subsequently requested that reasons be given in writing. Counsel for the employer submits that the Board is under no legal obligation to give written reasons or, alternatively, that the labour relations of the parties will not be served by an extensive elaboration of the allegations, and evidence heard by the Board. It is common ground that the Board's order was immediately implemented and that it resulted in the prompt execution of a collective agreement between the parties. The agreement has been administered for close to six months in a positive and harmonious atmosphere.

2. Section 17 of the *Statutory Powers Procedure Act*, R.S.O. 1980 c.484, provides:

A tribunal shall give its final decision and order, if any, in any proceedings in writing and shall give reasons in writing therefor if requested by a party.

3. In our view that section leaves the Board no discretion. It must provide reasons in writing when requested by a party to the proceedings before it. That is part of the concept of natural justice and fairness which underlies the *Statutory Powers Procedure Act*. We cannot accept the submission of counsel for the respondent that the obligation to provide written reasons when requested is triggered only when judicial review proceedings have been initiated against the Board.

4. That is not to say, however, that the Board is without discretion in the extent or the tone of reasons which it will write in a given case. Litigation is a means and not an end. The Board must always be mindful, like any tribunal, that it is primarily a problem-solving agency, devoted to resolving and quieting disputes. That is particularly important in the field of labour relations where parties and personalities are not involved in a one-time encounter, as often occurs in civil litigation, but must generally live together in an ongoing relationship. In that context the Board must tailor its reasons to the realities of the case before it. In some instances the dispute before the Board may require elaborate reasons couched in strong, unequivocal language. In other cases the remedial end will be better served by the rendering of the Board's findings, with the

briefest analysis of the facts and a minimum of comment. The choice of approach must be made by the Board with some care, having regard to the particular case before it.

5. In the instant case it is undisputed that the Board's order led to the termination of a protracted and bitter strike whose effect was felt throughout the francophone community in Ottawa. The evidence before the Board established a tragic breakdown in personal and employment relations of many years' standing, including bitter personal conflicts extending to persons both inside and outside the respondent company. It is undisputed that within days of the Board's order of April 27, 1982, the respondent implemented the Board's order to the full satisfaction of the union and concluded a collective agreement that returned its employees to work in an atmosphere of remarkably positive employer-employee relations. In these circumstances, the Board's order having fulfilled its purpose, we see little value in a protracted recital of the evidence that will vividly recall to the parties events that are best put behind them. We accept the submission of counsel for the union that the public interest is served in building the Board's jurisprudence for the future guidance of the labour relations community; that is especially true in cases of first impression or where some aspect of the evidence is of precedential interest. Where, as in this case, those elements are not present, the reasons for a Board decision can be considerably less elaborate without any cost to the jurisprudence or to the community. In any event, in communicating its reasons the Board must always be mindful of balancing the interests of enlightening the labour relations community with the immediate concern of the parties to the dispute to obtain the most constructive outcome.

6. With the foregoing considerations in mind the Board gives the following as reasons for its remedial order:

a) On the evidence before it the Board concluded that the officers of the company believed that if the union could be prevented for the period of one year from certification from making a collective agreement the union's bargaining rights would lapse automatically. On that basis, once the employees opted to strike, the company formulated the intention, reflected in the evidence of a number of witnesses from the ranks of management, to not make any collective agreement, thereby allowing the union's bargaining rights to lapse. That was a controlling motive in its decision to withdraw its offer to the union in December of 1981, when it had reason to believe that the offer might be accepted. By that intention and action the respondent violated section 15 of the Act. That finding and the consequences of the respondent's actions and the reasons for the remedial order in paragraphs 2, 3, 6, 7 and 8 of the decision of April 27, 1982.

b) It became apparent during the course of the hearing that certain employees who had applied unconditionally to return to work under section 73 of the Act had, without credible excuse, been denied reinstatement to their jobs within a reasonable period of time while employees hired during the strike were retained. That constitutes a violation of section 73(1) of the Act and is the reason for the

reinstatement order in paragraph 4 of the Board's order of April 27, 1982.

c) The evidence of certain members of management subpoenaed by the union tended to support some aspects of the union's complaint respecting the company's intention not to make a collective agreement once the strike began. In subsequent testimony another officer of the company intimated, more out of ignorance than design, that those witnesses would be answerable to the company for their evidence before the Board. The Board had no alternative but to find in that statement a threat of reprisal against witnesses for evidence given in proceedings before it. That is a violation of section 80(2) of the Act and is the reason for the remedial order in paragraph 5 of the Board's decision.

1054-82-R Labourers' International Union of North America, Local 183, Applicant, v. **Wickford Holdings Limited**, Respondent

Bargaining Unit – Employee – Husband and wife team employed as superintendent of apartment building – One lump sum payment – Work shared by both – Husband and wife both “employees” – Whether husband and wife to be included in separate full-time and part-time units respectively

BEFORE: R. O. MacDowell, Vice-Chairman, and Board Members S. Cooke and W. H. Wightman.

APPEARANCES: *B. Fishbein and T. Spada for the applicant; G. Grossman and F. Kovacs for the respondent.*

DECISION OF THE BOARD; October 25, 1982

1. The name of the respondent is amended to read: Wickford Holdings Limited.
2. This is an application for certification.
3. The Board finds that the applicant is a trade union within the meaning of section 1(1)(p) of the *Labour Relations Act*.
4. The respondent employer contends that James Raymond is its only employee and that since there cannot be a “one-man bargaining unit” this application must be dismissed. In the alternative, the respondent asserts that if Mrs. Blanche Raymond is also an employee, she is employed on only a part-time basis and should be included in a separate part-time bargaining unit. Since there are presently no other persons employed by the respondent, the result again would be a dismissal of the instant application. The union argues that Mr. and Mrs. Raymond are a husband and wife team, that both of

them are employees of the respondent, and that both should be in the same bargaining unit.

5. The relationship between the respondent and the Raymonds is governed by the following contract:

AGREEMENT FOR SUPERINTENDENT

This AGREEMENT made the 1st day of April, 1981

BETWEEN

WICKFORD HOLDINGS LIMITED, hereinafter called the "EMPLOYER"

- and -

MR. & MRS. RAYMOND, hereinafter called the "EMPLOYEE"

WHEREAS WICKFORD HOLDINGS LIMITED, is the owner of a 47 unit apartment building, municipally known as 188 Mill Street South, Brampton, Ontario

AND WHEREAS WICKFORD HOLDINGS LIMITED, has agreed to employ MR. & MRS. RAYMOND as superintendent of the building.

NOW THIS AGREEMENT WITNESSETH THAT in consideration of the mutual covenants and agreements herein contained, and subject to the terms and provisions herein set out, the parties hereto agree as follows:

1. The owner hereby hires the employee as superintendent of 188 Mill Street S., Brampton, Ontario, from and including the 1st day of April, 1981, to and including the first day of April, 1982.
2. The employee shall receive an annual salary of \$6,000.00 (Six Thousand Dollars) to be payable in equal monthly installments of \$500.00 (five Hundred Dollars) per month on the last day of every month, in cheque, plus a two bedroom apartment (equal in value to \$375.00 monthly), plus one parking space (equal to \$18.00 monthly) and hydro (equal to \$8.56 monthly) making a total consideration of \$901.56 (Nine Hundred and One Dollars and fifty six cents) per month.
3. The salary breakdown is as follows; \$200.00 for all general cleaning and rental duties and \$300.00 for painting of apartments, minor plumbing repairs, minor electrical repairs, repairing door locks, door closures, kitchen cupboards, hinges on

kitchen cupboards, closet doors and balcony doors etc. Should this part of the EMPLOYEE'S job not be performed and completed upon a given time period, the EMPLOYER shall have the right to call in outside contractors to complete the work and this shall be deducted from the salary of the EMPLOYEE.

4. The EMPLOYEE hereby agrees that he shall perform all services normally supplied by Superintendents to apartment buildings which services shall include, without limiting the generality of the foregoing:

- a) Gardening duties in spring-summer, snow removal from the main entrances in the winter;
- b) Cleaning of all areas, including garage and outdoors, collection and removal of garbage;
- c) Replacement of bulbs, minor electrical repairs in individual units.
- d) Inspect apartments with prospective tenants, and when a lease is terminating to verify for damages etc.
- e) Collection of rents and preparing the bank deposits, no later than the third day of each month.
- f) Supervise and time check on any other employee working for the EMPLOYER, or any sub-trades called in for repairs to the building or its equipment. The time and material are to be specified and the signature of the superintendent to be obtained prior to payment of the bill.
- g) Obtain keys and \$100.00 for breaking of the lease, from tenants who are terminating leases, prior to leaving.

N O T E : General cleaning duties shall consist of:

- 1. Clean the front doors and windows daily.
- 2. Check and clean up the laundry room daily.
- 3. Check public areas of building and pick up any papers etc. If a mess has been made, this must be cleaned daily.
- 4. Vacuum hallways a minimum of two times weekly.
- 5. Buff the floor in the main lobby a minimum of three times weekly.

6. Wash the stairways every second day.
 7. Clean elevator floor, walls and door every second day.
 8. Clean the interior of apartments prior to occupation of new tenants – the cleaning to include: fridge, stove, kitchen cupboards, floors washed and waxed, cupboards cleaned and repaired. If necessary paint the apartment, sand & refinish floors.
 9. Clear out garage area once a week – remove garbage, paper etc.
 10. To maintain:
 - a) recreation area in hygenic condition
 - b) Lobby room in working order.
 - c) The garbage area in hygenic condition.
5. The EMPLOYEE hereby acknowledges that the employment as a superintendent is a full time employment requiring the attendance on the premises of either the EMPLOYEE or members of his immediate family at all times in order to deal with any emergencies which may arise. If the EMPLOYEE either personally or through members of his immediate family is not in attendance at all times, the owner may terminate this agreement without notice, notwithstanding anything herein to the contract.
6. The EMPLOYEE shall not on behalf of the owner enter into any contract or agreements with any individuals, firms, corporations or otherwise, which agreements have the effect of binding the owner thereto.
7. As part of his duties as superintendent, the EMPLOYEE shall be required to show any unrented units to prospective tenants, to prepare offers to lease for presentation to the owner, when leases have been prepared by the owner, to obtain signatures of the tenants, collect rents and prepare deposits for the management. The EMPLOYEE shall not have the right to accept any leases or offers to lease on behalf of the owner, nor shall he be entitled to or have the right to alter in any way any existing lease, nor to accept on the owner's behalf any surrender of lease.
8. The EMPLOYEE shall immediately advise the owner of any breaches of leases or regulations by any tenant of their invitees or guests and he shall at all times advise the Landlord of any damages to the premises or to the units or of any deterioration to the building or any parts thereof.

9. The owner may at any time, terminate the employment upon giving the EMPLOYEE two week's notice, or at any time for cause. The EMPLOYEE shall have the same privilege regarding termination of employment with the EMPLOYER. The EMPLOYEE agrees to vacate the occupied apartment unit in 30 days from the date of notice.

IN WITNESS WHEREOF WICKFORD HOLDINGS LIMITED has hereunto affixed its corporate seal duly attested by the hand of its authorized signing officer duly authorized in that behalf.

WITNESS

WICKFORD HOLDINGS
LIMITED

PER "F. F. Kovacs"
F.F. Kovacs, LL.B. President

AND IN WITNESS WHEREOF, Mr. & Mrs. Raymond have hereunto set their hand, this 8 day of April, 1981.

WITNESS

"Mr. J. Raymond"
MR. RAYMOND

"Mrs. B. Raymond"
MRS. RAYMOND

It will be noted that the preamble to the agreement indicates that the respondent "has agreed to employ Mr. and Mrs. Raymond as superintendent of the building", that both individuals are referred to in the style of the agreement, and that both of them signed the contract. The respondent maintains, however, that it was only hiring Mr. Raymond.

6. Before they were hired, Mr. and Mrs. Raymond attended a pre-employment interview conducted at an apartment building where Mrs. Raymond was then the superintendent. This location was chosen so that Mr. Kovacs, the president of the respondent, could assess the quality of their work there. It was Mrs. Raymond who answered Kovacs' advertisement and arranged for the interview, and both Mr. and Mrs. Raymond took part in the discussions - although it appears that Mr. Kovacs was primarily interested in Mr. Raymond's ability to perform certain semi-skilled maintenance tasks involving plastering, plumbing, electrical work, etc.

7. Nor does Mrs. Raymond's name appear on the contract solely as a matter of form. She testified that she spends between twenty and twenty-five hours per week carrying out duties of the kind prescribed in paragraph 4 of the agreement. She has arranged for the renting of apartments, she collects rents and key money, she has made out the required paper-work when a tenant was in default, she cleans the building on a regular basis, she screens prospective tenants, she calls in repairmen where required, she cleans the units when the tenants have vacated, she purchases paint from a local store using a credit card in the company's name (but signing the receipt with her own), and she takes direction from Mr. Kovacs by telephone or otherwise concerning matters

related to the building. Her duties are not peripheral or incidental to those performed by her husband.

8. For some time Mrs. Raymond has had another full-time job, but in conversations with Mr. Kovacs she was advised that he had no objection so long as the building was kept clean. Some of the telephone calls from Mr. Kovacs mentioned above were directed to Mrs. Raymond at her other place of employment. There is no evidence that her full-time job prevents her from performing the tasks listed in paragraph 4 of the contract, nor would it necessarily detract from her status as an employee of the respondent if she were also employed elsewhere.

9. The employee salary specified in paragraph 2 of the contract is in fact paid directly to Mrs. Raymond – an arrangement which she requested and to which the respondent agreed. A cheque is made out in her name for the entire amount. There are no deductions made and no apportioning of payment as between herself and her husband. Of course, she also shares with her husband the two bedroom apartment which is a significant part of the compensation package.

10. This is not the first time that a question has arisen concerning the employee status of the spouse of an apartment building superintendent. A similar issue arose in *Marchant Property Management*, [1981] OLRB Rep. Oct. 1433 – although in that case it was the employer which argued that both spouses were employees. The Board had this to say:

5. The applicant contends that in accordance with the established practice in the industry, the wives of the superintendents should not be considered “employees” within the meaning of the *Labour Relations Act*. The applicant does not agree with this practice (which, for reasons which will become apparent, may put women at a real economic disadvantage) but the practice is a long-standing one and apparently has been taken into account when collective agreements have been negotiated. However, this issue has not previously arisen before the Board although, on numerous occasions, bargaining units similar to that sought in the instant case have been certified. Apparently, no party has ever considered it necessary to raise it.

6. Counsel for the respondent contends that the spouse of the superintendents are properly regarded as “employees” within the meaning of the *Labour Relations Act*. The couple are hired as a team and both of them perform work for the respondent. Unsatisfactory work performance by either partner can lead to termination. Both husband and wife are under the direction, control and authority of the respondent’s management. They share an apartment provided for their use. However, the salary or compensation associated with the work of the team is paid only to the husband. No income tax is deducted on behalf of the wife, nor is she issued a T-4 form. There are no Unemployment Insurance, Canada Pension Plan, or Workmen’s Compensation deductions either. It is this latter aspect of the

relationship with which the union does not agree and which may place the wife at a severe economic disadvantage in a variety of circumstances beyond her control.

7. The essence of an employment relationship is that an individual provides work or services to another for compensation. (See generally *Whittaker vs. Minister of Pensions and National Insurance* [1966] 3 All ER 531; and the recent review of the indicia of employment in *Algonquin Tavern*, [1981] OLRB Rep. Oct. 1433. In the instant case there is no doubt that the wives of the superintendents perform work or services under the direction and control of the respondent's management. Equally clearly they are not "volunteers", but part of an "employment team" hired to do this kind of work. We do not think the fact that the teams' remuneration is paid to only one spouse is determinative of the character of the relationship; nor, in the circumstances of this case, have we given much weight to the respondent's failure to deduct employee benefits. (The respondent's obligation in this regard depends upon the definition of "employee" in other statutes as does the wives' entitlement to benefits). In our view the respondent's provision of accommodation share by both spouses is more indicative of the character of the relationship. On the basis of all of the evidence before it, the Board finds that Marylou Pringle and Rita Struthers are employees within the meaning of the *Labour Relations Act*.

11. In our view, the present case is indistinguishable from *Marchant Property Management, supra*. In both cases the employer hired a couple who were expected to perform certain duties but were paid a lump sum and permitted to divide the work between them. Indeed, the evidence here is even stronger given the form of the contractual relationship between the parties and the payment of remuneration directly to the spouse whom the employer now claims is not an employee. In our view, both the form and substance of the relationship indicate that Mr. and Mrs. Raymond are employees of the respondent company. This is not a case in which Mrs. Raymond's duties can be described as merely helping her spouse out. On the contrary, it is our view that she is every bit as much an employee as her husband.

12. The respondent argues in the alternative that it has an established practice of hiring part-time employees and students, and that if Mrs. Raymond is found to be a part-time employee she should properly be included in a separate part-time bargaining unit. However, there were no part-time employees or students employed on the application date, and the respondent's practice of hiring such individuals is irregular or sporadic at best. In the one and a half years that the Raymonds have worked for the respondent, the part-time employees referred to, consisted of two students hired for about a week to paint an apartment, and the Raymonds' son who was hired on one occasion for a few days. Mr. Kovacs testified that some years ago when he was looking after the building, he hired a cleaning women to come in two to three days per week, that a tenant used to work several hours per week helping with the garbage, and that there may have been a student during the school vacation period. However, that is not the respondent's current practice, and even if it was, it is doubtful whether the Board's

usual approach to part-time bargaining units should be applied in the unique circumstances of this case. Regardless of the labour relations considerations underpinning the Board's usual practice in respect of part-time employees, it would make no sense to hold that one spousal member of the "employee team" was in one bargaining unit, and the other spouse in a different one. It would certainly be a curious result if the two "partners", sharing the same apartment and dividing the tasks between them on an ongoing basis, were separated into different bargaining units – especially where, as here, the result of such finding would be that for practical purposes, neither individual could engage in collective bargaining.

13. Having regard to the foregoing, the Board finds that Mr. and Mrs. Raymond are both employees of the respondent and that the unit of employees appropriate for collective bargaining should be described as follows:

"All employees of the respondent engaged in cleaning and maintenance at 188 Mill Street South, Brampton, Ontario, including resident superintendents, save and except property manager, office and clerical staff, and students employed during the school vacation period."

14. The Board is satisfied on the basis of all the evidence before it that more than fifty-five per cent of the employees of the respondent in the bargaining unit, at the time the application was made, were members of the applicant on September 15, 1982, the terminal date fixed for this application and the date which the Board determines, under section 103(2)(j) of the *Labour Relations Act*, to be the time for the purpose of ascertaining membership under section 7(1) of the said Act.

15. A certificate will issue to the applicant.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD SEPTEMBER 1982

BARGAINING AGENTS CERTIFIED

No Vote Conducted

0668-81-R: Labourers' International Union of North America, Local 1081, (Applicant) v. Warren Bitulithic Limited, (Respondent) v. International Union of Operating Engineers, Local 793, (Intervener).

Unit: "all construction labourers in the employ of the respondent in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in unit).

0095-82-R: Canadian Union of Public Employees, (Applicant) v. Cochrane-Iroquois Falls District Roman Catholic Separate School Board, (Respondent) v. Employee, (Objector).

Unit: "all office, clerical and technical employees of the respondent, save and except the Superintendent of Business, persons above the rank of Superintendent of Business, Accountant, Administrative Assistant to the Director of Education, persons regularly employed for not more than twenty-four (24) hours per week, students employed during the school vacation period and persons covered by existing collective agreements with the Cochrane-Iroquois Falls Roman Catholic Separate School Board." (18 employees in unit).

0547-82-R: United Rubber, Cork, Linoleum and Plastic Workers of America, (Applicant) v. Westroc Industries Limited, Plastics Division, (Respondent).

Unit: "all employees of the Plastics Division of the respondent at Mississauga, Ontario, save and except quality/inventory control technicians, process and development technicians, laboratory technicians, foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation periods." (34 employees in unit).

0643-82-R: Retail Clerks Union, Local 409, (Applicant) v. Northwest Merchants Limited Canada, (Respondent), v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Town of Keewatin, Ontario, save and except manager, persons above the rank of manager and secretary book-keeper. (11 employees in unit).

0647-82-R: United Headwear, Optical and Allied Workers Union of Canada, Local 3, (Applicant) v. Krystal Cap Company Limited, (Respondent) v. Capmakers Union Local 47 of the United Hatters, Cap and Millinery Workers International Union, (Intervener).

Unit: "all employees of the respondent engaged as cutters, blockers, operators, finishers and utility workers required by the respondent in the manufacturing of all headwear such as hats, caps and/or children's headwear, save and except packers, foremen, office and sales staff and persons regularly employed for not more than twenty-four (24) hours per week." (2 employees in unit). (*Having regard to the agreement of the parties*).

0795-82-R: United Cement, Lime, Gypsum and Allied Workers International Union, (Applicant) v. Indusmin Limited, (Respondent)

Unit: "all owner-drivers of one single-unit dump truck who are dependent contractors regularly engaged in hauling construction aggregates from the respondent's action quarry to job sites, save and except persons covered by subsisting collective agreements, dispatchers, assistant dispatchers, students employed during the school vacation period, office staff, sales and customer services and customers' personnel." (12 employees in unit).

0895-82-R: Labourers' International Union of North America, Local 493, (Applicant) v. Rampart Enterprises Ltd., (Respondent).

Unit: "all construction labourers in the employ of the the respondent within a radius of 57 kilometers (approximately 35 miles) of the City of Sudbury Federal Building, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit). (*Having regard to the agreement of the parties*).

0898-82-R: International Brotherhood of Electrical Workers, Local 773, (Applicant) v. Ken's Industrial Service Ltd., (Respondent).

Unit: "All electricians and electricians' apprentices in the employ of the respondent in the City of Windsor, save and except foremen and person above the rank of foreman." (3 employees in unit). (*Having regard to the agreement of the parties*).

0899-82-R: International Brotherhood of Electrical Workers, Local 773, (Applicant) v. Ken's Industrial Services Ltd., (Respondent).

Unit #1: "all electricians and electricians' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foreman." (4 employees in unit).

Unit #2: "all electricians and electricians' apprentices in the employ of the respondent in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (4 employees in unit).

0903-82-R: Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Domtar Inc., (Respondent).

Unit: "all employees of the respondent at its Recycling Division of the Packaging Group in Windsor, save and except foremen, those above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (6 employees in unit). (*Having regard to the agreement of the parties*).

0906-82-R: International Union of Operating Engineers, Local 793, (Applicant) v. Jean-Dan Limited, (Respondent).

Unit #: "all employees in the employ of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all employees of the respondent engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining

of same in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit).

0907-82-R; 0908-82-R: Hotel, Restaurant and Cafeteria Employees Union, Local 75, (Applicant) v. Princess Hotel Kingston Ltd. (carrying on business as the Princess Hotel and the Shamrock Hotel) (Respondent) v. Group of Employees, (Objectors).

Unit: “all employees of Princess Hotel Kingston Ltd., a its hotel operations in the municipality of Kingston, Ontario, save and except managers, office and sales staff and audit department.” (29 employees in unit).

0942-82-R: London and District Service Workers’ Union, Local 220, S.E.I.U., A.F.L., C.I.O., C.L.C., (Applicant) v. Chelsey Park Oxford, a Division of Diversicare Corporation, (Respondent).

Unit: “all employees of the respondent at its apartment complex in London, Ontario, regularly employed for not more than twenty-four hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, professional nursing staff, office and clerical staff, and persons covered by subsisting collective agreements.” (2 employees in unit). (*Having regard to the agreement of the parties.*)

0949-82-R: Labourers’ International Union of North America, Local 1036, (Applicant) v. Common Construction Company Ltd., (Respondent).

Unit #1: “all construction labourers in the employ of the respondent in the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in unit).

Unit #2: “all construction labourers in the employ of the respondent in that portion of the District of Algoma, South of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.” (5 employees in unit).

0979-82-R: U.A.W., (Applicant) v. Olsonite Company Limited, (Respondent).

Unit: “all employees of the respondent in Kingsville, Ontario save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (75 employees in unit). (*Having regard to the agreement of the parties.*)

0987-82-R: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Keeprite Inc. – Unifin Division, (Respondent) v. Employee, (Objector).

Unit: “all office, clerical and technical employees of the respondent in the City of London, save and except supervisors, persons above the rank of supervisor, professional engineers, secretary to the General Manager, Company Accountant, Product Managers, Product Manager Trainee, Cost Accountant, Computer Programmer, Programmer Analyst, Senior Product Development Technician, Senior Industrial Engineering Technician, Industrial Engineering Technicians, Payroll Accountant, Personnel Administrator, Personnel Assistant, Sales Co-ordinator, students employed during the school vacation period, students in a co-operative training program, and employees covered by the U.A.W. Local 27 agreement.” (43 employees in unit). (*Having regard to the agreement of the parties.*) (*Clarity Note.*)

0989-82-R: Retail, Wholesale and Department Store Union, AFL:CIO:CLC, (Applicant) v. General Bakeries Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all office and clerical employees of the respondent at the Township of Westminister save and except plant accountant, persons above the rank of plant accountant, sales staff, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and persons covered by subsisting collective agreement." (15 employees in unit).

0993-82-R: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Intercontinental Warehouses, A Division of Valleydene Corporation Limited, (Respondent).

Unit: "All employees of the respondent in Metropolitan Toronto, save and except foremen, persons above the rank of foreman, office and sales staff, and students employed during the school vacation period." (25 employees in unit). (*Having regard to the agreement of the parties*).

1002-82-R: Service Employees Union, Local 204, affiliated with A.F.L. C.I.O., C.L.C., (Applicant) v. Central Park Lodges of Canada, (Respondent).

Unit: "all employees of the respondent at its retirement lodges in Metropolitan Toronto, regularly employed for not more than twenty-two and one-half (22-12) hours per week and students employed during the school vacation period save and except professional nursing staff, physiotherapists, occupational therapists, supervisors, foremen, persons above the rank of supervisor or foreman, office staff and persons covered by subsisting collective agreements." (54 employees in unit). (*Having regard to the agreement of the parties*).

1038-82-R: Service Employees Union, Local 204 A.F.L., C.I.O., C.L.C., (applicant) v. Albright Gardens Homes Incorporated (Albright Manor), (Respondent).

Unit: "all employees of the respondent in Beamsville, Ontario, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except professional medical staff, registered and graduate nurses, graduate pharmacists, graduate dieticians, craft instructor, paramedical employees, clerical staff, persons employed for a specific term and/or task under a Government Employment Programme, purchasing agents, stockkeeper supervisors, persons above the rank of supervisor and persons who are covered by subsisting collective agreements." (74 employees in unit). (*Having regard to the agreement of the parties*).

1041-82-R: The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, on behalf of Locals 1007, 1151, 1244, 1410, 1425, 1592, 1916 and 2309, (Applicant) v. Selby Sheet Metal & Mechanical Contracting Ltd., (Respondent).

Unit #1: "all millwrights and millwrights' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all millwrights and millwrights' apprentice in the employ of the respondent in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand, excluding the industrial, commercial and institutional sector, save and except non-working foremen, persons above the rank of non-working foreman and persons for whom United Brotherhood of Carpenters and Joiners of America, Local 1151 is the bargaining agent." (2 employees in unit).

1044-82-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Cloutier & Elliott (1976) Ltd., (Respondent).

Unit #1: "all carpenters and carpenters' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the District of Kenora, including the Patricia portion, but excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (3 employees in unit).

1045-82-R: Ontario Public Service Employees Union, (Applicant) v. Deep River and District Hospital, (Respondent).

Unit: "all paramedical employees of the respondent at Deep River, Ontario, save and except Chief Laboratory Technologist, Head of Physiotherapy, Director of Medical Records, those above such rank, and physicians." (6 employees in unit). (*Having regard to the agreement of the parties*). *Clarity Note*.

1046-82-R: Hotel and Restaurant Employees Union, Local 756, (Applicant) v. Royal Canadian Legion, Branch 163, (Respondent).

Unit #1: "all employees of the respondent at Hamilton, Ontario, save and except manager, persons above the rank of manager, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (6 employees in unit). (*Having regard to the agreement of the parties*).

Unit #1: "all employees of the respondent at Hamilton, Ontario, save and except manager, persons above the rank of manager, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (6 employees in unit). (*Having regard to the agreement of the parties*).

1049-82-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.), (Applicant) v. Cawl Division of UAP Inc., (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, Ontario, save and except foremen, persons above the rank of foreman, office, sales and customer service staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (45 employees in unit). (*Having regard to the agreement of the parties*).

1055-82-R: International Beverage Dispensers' and Bartender's International Union, AFL, CIO, CLC, (Applicant) v. Chez-Moi Tavern Limited, (Respondent).

Unit: "all full-time and part-time tapmen, bartenders and waiters of the respondent in Metropolitan Toronto." (17 employees in unit). (*Having regard to the agreement of the parties*).

1060-82-R: Canadian Union of Operating Engineers and General Workers, (Applicant) v. Midmetro Plastics Ltd., (Respondent).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (7 employees in unit). (*Having regard to the agreement of the parties*).

1078-82-R: Canadian Union of Public Employees, (Applicant) v. Steamway Villa Nursing Home, (Respondent).

Unit #1: "all employees of the respondent at Cobourg, Ontario save and except professional medical staff, graduate nurses, supervisors, persons above the rank of supervisor, activities director, office staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period." (16 employees in unit). (*Having regard to the agreement of the parties*).

Unit #2: "all employees of the respondent at Cobourg, Ontario, regularly employed for not more than 24 hours per week and students employed during the school vacation period save and except professional medical staff, graduate nurses, supervisors, persons above the rank of supervisor, activities director and office staff." (16 employees in unit). (*Having regard to the agreement of the parties*).

1081-82-R: Christian Labour Association of Canada, (Applicant) v. Anthony L. Mousinho carrying on business as Seniorcare Retirement Residence, (Respondent).

Unit: "all employees of the respondent employed in the City of St. Catharines, Ontario, save and except the administrator and persons above the rank of the administrator." (8 employees in unit). (*Having regard to the agreement of the parties*).

1086-82-R: Christian Labour Association of Canada, (Applicant) v. Caressant Care Nursing Home of Canada Ltd., carrying on business as Caressant Care Rest Home, (Respondent).

Unit #1: "all employees of the respondent at Lindsay, save and except registered and graduate nurses, supervisors persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (3 employees in unit).

Unit #2: "all employees of the respondent at Linday, regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except registered and graduate nurses, supervisors, persons above the rank of supervisor, and office and clerical staff." (4 employees in unit).

1114-82-R: United Brotherhood of Carpenters and Joiners of America, Local Union #93, (Applicant) v. Duciaume Installation Ltee, (Respondent).

Unit #1: "all carpenters and carpetners' apprentices in the employ of the respondent in the industrial commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: "all carpenters and carpenters' apprentices in the employ of the respondent in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

1116-82-R: The Millwright District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, on behalf of Locals 1007; 1151; 1244; 1410; 1425; 1592; 1916 and 2309, (Applicant) v. Rexway Sheet Metal Limited, (Respondent).

Unit #1: "All millwrights and millwrights' apprentices in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit).

Unit #2: “all millwrights and millwrights’ apprentices in the employ of the respondent in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Township of Nassagaweya, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman and persons for whom United Brotherhood of Carpenters and Joiners of America, Local 1151 is the bargaining agent.” (2 employees in unit).

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

0253-82-R: Labourers’ International Union of North America, Local 607, (Applicant) v. PCL Construction Ltd., (Respondent).

Unit: “all construction labourers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the respondent in all other sectors in the District of Kenora including the Patricia portion, save and except non-working foremen and persons above the rank of non-working foreman.” (2 employees in unit.)

Number of persons on revised voters’ list		2
Number of persons who cast ballots	2	
Number of ballots marked in favour of applicant		2
Number of ballots marked against applicant		0

0600-82-R: United Headwear, Optical and Allied Workers Union of Canada, Local 3, (Applicant) v. Imperial Optical Company Ltd., (Respondent) v. Optical & Plastic Technicians and Allied Workers Union, Local 67, United Hatters, Cap & Millinery Workers International Union, (Intervener).

Unit: “all employees of the respondent in its Prescription laboratory and its Dispensary at St. Catharines, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period.” (8 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters’ list		6
Number of persons who cast ballots	6	
Number of ballots marked in favour of applicant		6
Number of ballots marked in favour of intervener		0

0647-82-R: United Headwear, Optical and Allied Workers Union of Canada, Local 3, (Applicant) v. Krystal Cap Company Limited, (Respondent) v. Capmakers Union Local 47 of the United Hatters, Cap and Millinery Workers International Union, (Intervener).

Unit: “all employees of the respondent engaged as cutters, blockers, operators, finishers and utility workers required by the respondent in the manufacturing of all headwear such as hats, caps and/or children’s headwear, save and except packers, foremen, office and sales staff and persons regularly employed for not more than twenty-four (24) hours per week.” (2 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters’ list		72
Number of persons who cast ballots	60	
Number of ballots marked in favour of applicant		55
Number of ballots marked in favour of intervener		5

0842-82-R: United Steelworkers of America, (Applicant) v. Standard Pressure Pipe Company Division of Standard Industries Ltd., (Respondent) v. Christian Labour Association of Canada, (Intervener).

Unit: "all employees of Standard Pressure Pipe Company, a division of Standard Industries Ltd., at or out of its premises located in Whitchurch Township, save and except foremen, persons above the rank of foreman, office staff, sales staff, security guards, students employed during the school vacation period, and the Quality Control Department." (44 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared		47
Number of persons who cast ballots	46	
Number of ballots marked in favour of applicant		43
Number of ballots marked in favour of intervener		3

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

1916-81-R: Melvin Dolph, (Applicant) v. Labourers, International Union of North America, Local 607, (Respondent) v. Terra Krete Limited, Sault Holdings Limited, Best Building Products Limited, 464011 Ontario Ltd., and 444 348 Ontario Ltd., (Intervener).

Unit: "all employees of Terra Krete Limited, Sault Holdings Limited, Best Building Products Limited, 464011 Ontario Ltd., and 444348 Ontario Ltd. working in and out of the plant at 1200 Kam Road, Thunder Bay, Ontario, save and except non-working foremen, persons above the rank of non-working foreman, office and sales staff." (6 employees in unit).

Number of names of persons on list as originally prepared by employer		6
Number of persons who cast ballots	5	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		5

0642-882-R: United Steelworkers of America, (Applicant) v. Marshall Industries Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in the Municipality of Metropolitan Toronto save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period." (103 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		100
Number of persons who cast ballots	95	
Number of ballots marked in favour of applicant		88
Number of ballots marked in favour of Marshall Industries Employees' Association		7

0652-82-R: Independent Canadian Steelworkers, Union, (Applicant) v. Advanced Extrusions Limited, (Respondent) v. Advanced Extrusions Employees' Association, (Intervner) v. Group of Employees, Objectors).

Unit: "all employees of the respondent at Penetanguishene, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, students employed during the school vacation period, and persons regularly employed for not more than twenty-four hours per week." (104 employees in unit).

Number of persons on voters' list at start of vote		140
Number of persons who cast ballots	128	
Number of spoiled Ballots		1
Number of ballots marked in favour of applicant		79
Number of ballots marked in favour of intervener		48

Applications for Certification Dismissed – No Vote Conducted

0454-82-R: Service Employees Union, Local 210, Affiliated with Service Employees International Union, A.F.L.' C.I.O., C.L.C., (Applicant) v. The Diocesan Roman Catholic High School Board of Metropolitan Windsor (00 employees in unit).

0938-82-R: Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Applicant) v. Booth Fisheries, (Respondent). (11 employees in unit.)

0995-82-R: Canadian Union of United Brewery, Flour Cereal, Soft Drink and Distillery Workers, Local Union 326, (Applicant) v. Hostess Food Products Limited, (Respondent). (376 employees in unit).

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

2535-81-R: Labourers' International Union of North America, (Applicant) v. Diplock Durable Floor Company Limited, (Respondent) v. Operative United Plasterers' and Cement Masons' International Association of the United States and Canada, Local Union No. 598, (Intervener).

Unit: "all working foremen, journeymen, apprentice cement masons and waterproofers in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all working foremen, journeymen, apprentice cement masons and waterproofers in the employ of the respondent in all other sectors in the Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Township of Esquesing, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen, and persons above the rank of non-working foreman." (17 employees in unit).

Number of names of persons on revised voters' list		6
Number of persons who cast ballots	11	
Number of ballots marked in favour of applicant		2
Number of ballots marked in favour of intervener		3
Ballots segregated and not counted		6

2705-81-R: Laborers' International Union of North America, Local 607, (Applicant) v. Tom Jones & Sons Limited, (Respondent) v. Lumber and Sawmill Workers' Union, Local 2693 of the United Brotherhood of Carpenters and Joiners of America, (Intervener).

Unit: "all construction labourers and all employees engaged in cement finishing, waterproofing and restoration work in the employ of the respondent in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers and all employees engaged in cement finishing, waterproofing and restoration work in the employ of the respondent in all other sectors in the Districts of Thunder Bay, Rainy River and Kenora including the Patricia Portion, save and except non-working foremen and persons

above the rank of non-working foreman." (11 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared by employer		12
Number of persons who cast ballots	9	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		3
Number of ballots marked in favour of intervener		5

0646-82-R: United Headwear, Optical and Allied Workers Union of Canada, Local 3, (Applicant) v. Imperial Hat & Cap Company Limited, (Respondent) v. Capmakers Union Local 47 of the United Hatters, Cap and Millinery Workers Interantional Union, (Intervener).

Unit: "all employees of the respondent engaged as cutters, blockers, operators, finishers and utility workers required by the respondent in the manufacturing of all headwear such as hats, caps and/or children's headwear, save and except packers foremen, office and sales staff and persons regularly employed for not more than twenty-four (24) hours per week." (12 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		11
Number of persons who cast ballots	10	
Number of ballots marked in favour of applicant		1
Number of ballots marked in favour of intervener		9

0759-82-R: International Union of Operating Engineers, Local 796, (Applicant) v. Sperry, Inc. Sperry Division (Rockland Facility), (Respondent).

Unit: "all employees of the respondent in Rockland, Ontario save and except supervisors, those above the rank of supervisor, office and sales staff, engineering and technical staff, students employed during the school vacation period and students employed on a co-operative basis with a university or community college and persons regularly employed for not more than 24 hours per week." (28 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on list as originally prepared		29
Number of persons who cast ballots	29	
Number of ballots marked in favour of applicant		12
Number of ballots marked against applicant		17

0837-82-R: Canadian Paperworkers Union, (Applicant) v. Spruce Falls Power and Paper Company, Limited, (Respondent) v. The Lumber and Sawmill Workers Union, Local 2995 of the United Brotherhood of Carpenters and Joiners of America, (Intervener).

Unit: "all employees of the respondent who are engaged in Woods Operations on the limits and on the work sites of the respondent." (669 employees in unit). (*Having regard to the agreement of the parties*). *Clarity Note*).

Number of names of persons on list as originally prepared by employer		667
Number of names of persons on revised voters' list		456
Number of persons who cast ballots	456	
Number of spoiled ballots		2
Number of ballots marked in favour of applicant		129
Number of ballots marked in favour of intervener		325

0843-82-R: Canadian Union of Operating Engineers & General Workers, (Applicant) v. Consolidated Maintenance Services Limited, (Respondent) v. Service employees Union, Local 204, A.F.L., C.I.O., C.L.C., (Intervener).

Unit: "all employees of Standard Pressure Pipe Company, a division of Standard Industries Ltd., at or out of its premises located in Whitchurch Township, save and except foremen, persons above the rank of foreman, office staff, sales staff, security guards, students employed during the school vacation period, and the Quality Control Department." (17 employees in unit). *(Having regard to the agreement of the parties).*

Number of names of persons on list as originally prepared by employer		17
Number of persons who cast ballots	17	
Number of ballots marked in favour of applicant	4	4
Number of ballots marked in favour of intervener		13

Applications for Certification Dismissed Subsequent to a Post Hearing Vote

1051-81-R: United Brotherhood of Carpenters and Joiners of America Local 1190, (Applicant) v. Ofira Construction, (Respondent).

Unit: "all carpenters and carpenters' apprentices in the employ of the respondent in Metropolitan Toronto, the Regional Municipality of York and the County of Peel, the Township of Esquesing and the Towns of Oakville and Milton in the County of Halton and the Township of Pickering in the Province of Ontario, excluding the industrial commercial and institutional section, save and except non-working foremen and persons above the rank of non-working foreman." (6 employees in unit).

Number of names of persons on list as originally prepared		9
Number of persons who cast ballots	6	
Number of ballots marked in favour of applicant		0
Number of ballots marked against applicant		3
Ballots segregated and not counted		3

1276-81-R: Service Employees Union, Local 204 Affiliated with A.F.L., C.I.O., C.L.C., (Applicant) v. Extendicare Diagnostic Services, Division of Extendicare Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all office and clerical employees of the respondent in Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, personal secretary to the assistant vice-president, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (24 employees in unit).

Number of names of persons on list as originally prepared by employer		25
Number of persons who cast ballots	23	
Number of ballots marked in favour of applicant		1
Number of ballots marked against applicant		22

0722-82-R: Service Employees Union, Local 204 Affiliated with A.F.L., C.I.O., C.L.C., (Applicant) v. Extendicare Diagnostic Services Division of Extendicare Limited, (Respondent) v. Group of Employees, (Objectors).

Unit: "all employees of the respondent in Metropolitan Toronto save and except supervisors, persons above the rank of supervisor, office and clerical employees and sales staff." (12 employees in unit).

Number of names of persons on revised voters' list		6
Number of persons who cast ballots	6	
Number of ballots marked in favour of applicant		0
Number of ballots marked against applicant		6

0753-82-R: Amalgamated Clothing and Textile Workers Union - Toronto Joint Board, (Applicant) v. Universal Knitting Limited, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, save and except foremen and foreladies, persons above the rank of foreman or forelady, mechanics, designers, office and sales staff, and persons regularly employed for not more than twenty-four hours per week." (86 employees in unit). (*Having regard to the agreement of the parties*).

Number of names of persons on revised voters' list		81
Number of persons who cast ballots	65	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		28
Number of ballots marked against applicant		36

0877-82-R: Service Employees Union, Local 204, Affiliated with the A.F.L., C.I.O., C.L.C., (Applicant) v. Mayfair Manor Nursing Home, (Respondent).

Unit: "all employees of the respondent in Metropolitan Toronto, Ontario, save and except professional medical staff, professional nursing staff, paramedical staff, supervisors, persons above the rank of supervisor, office staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (17 employees in unit).

APPLICATIONS FOR CERTIFICATION WITHDRAWN

2638-81-R: International Brotherhood of Painters and Allied Trades Local Union 1891, (Applicant) v. Mandeville Scott Ltd., (Respondent) v. The Operative Plasterers and Cement Masons International Association of the United States and Canada Local 915, (Intervener).

0242-82-R: United Brotherhood of Carpenters and Joiners of America, Locals 1256 and 1316, (Applicants) v. Merit Drywall & Coustics Limited, (Respondent).

0559-82-R: United Steelworkers of America, (Applicant) v. Champion Parts Rebuilders, Canada Ltd., (Respondent) V. Group of Employees, (Objectors).

0629-82-R: Energy and Chemical Workers Union, (Applicant) v. Consumers Gas Company, (Respondent).

0894-82-R: Labourers' International Union of North America, Local 183, (Applicant) v. Wickford Holdings, (Respondent).

0897-82-R: Labourers' International Union of North America, Local 183, (Applicant) v. Parkview Property Management and/or Jane Wilson Towers

0948-82-R: Hotel, Restaurant & Cafeteria Employees Union, Local 75, (Applicant) v. Howard Johnson Airport Hotel, (Respondent).

0954-82-R: The Pattern Makers League of North America Windsor Association, (Applicant) v. Team Pattern and Model Ltd., (Respondent).

0978-82-R: Canadian Union of Public Employees, (Applicant) v. The Niagara Institute, (Respondent).

1093-82-R: Algoma Construction Workers Union, (Applicant) v. Ellwood Robinson Construction Co. Ltd., (Respondent).

1098-82-R: Canadian Union of Public Employees, (Applicant) v. The Niagara Institute, (Respondent).

1112-82-R: Canadian Union of Public Employees, (Applicant) v. Crothall Services Limited, (Respondent).

1149-82-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669, (Applicant) v. Bruce S. Evans Ltd., (Respondent).

1164-82-R: The Canadian Union of Public Employees, (Applicant) v. The Shaver Hospital for Chest Diseases, (Respondent).

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

2524-81-R: Toronto Central Ontario Building and Construction Trades Council (formerly known as The Building and Construction Trades Council of Toronto and Vicinity) on its own behalf and on behalf of its affiliated, The International Brotherhood of painters and Allied Trades District Council #46, (Applicant) v. M. J. Guthrie Construction Limited, Rosedale Construction, (Respondents). (*Granted*).

1003-82-R: United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. Yves Paquet and 100878 Canada Ltee., (Respondent). (*Granted*).

SALE OF A BUSINESS

1916-81-R: Labourers' International Union of North America, Local 607, (Applicant) v. Terra Krete Limited, Sault Holdings Limited, Best Building Products Limited, 464011 Ontario Ltd., and 444348 Ontario Ltd., (Respondents). (*Granted*).

0244-82-R: United Brotherhood of Carpenters and Joiners of America, Locals 1256 and 1316, (Applicants) v. Merit Drywall & Accoustics Limited, (Respondent). (*Withdrawn*).

0390-82-R: International Brotherhood of Painters and Allied Trades, Local 1891, (Applicant) v. Mar-ot Painting Construction Limited, (Respondent). (*Granted*).

0542-82-R: The United Association of the Plumbing and Pipefitting Industry, Local Union 666, (Applicant) v. Olympic Plumbing and Heating, and 442510 Ontario Incorporated carrying on business as The Watercloset, and 437820 Ontario Inc., and John Hajcman Plumbing and Heating Ltd., (Respondents). (*Granted*).

0637-82-R: Sheet Metal Workers International Association, Local Union 473, (Applicant) v. Williamson Roofing & Sheet Metal Limited, Williamson & Sons (London), Limited and Williamson Bros. Ltd., (Respondent). (*Granted*).

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

1537-80-R: Quality Craft Interiors Limited, (Applicant) v. Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1748, 1963, 1304, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America, (Respondent). (*Withdrawn*).

2219-81-R: Grant Hartley, (Applicant) v. Canadian Union of Operating Engineers and General Workers, (Respondent). (*Dismissed*).

2465-81-R: Melvin Dolph, (Applicant) v. Labourers' International Union of North America, Local 607, (Respondent) v. Terra Krete Limited, Sault Holdings Limited, Best Building Products Limited, 464011 Ontario Ltd., and 444348 Ontario Ltd., (Intervener). (*Granted*).

2571-81-R: Gilles Mathon and Other Employees of Northland Glass and Metal Limited, (Applicant) v. The International Brotherhood of Painters and Allied Trades Local 1904, (Respondent).

Unit: "All employees working at and out of the employer's North Bay Branch, save and except supervisors, office and sales staff." (*Granted*).

Number of names of persons on list as originally prepared by employer		5
Number of persons who cast ballots	5	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		5

0334-882-R: Robert Watson, (Applicant) v. United Electrical Radio & Machine Workers of America (UE0, (Respondent) v. Westinghouse Canada Inc., (Intervener) v. Group of Employees, (Objectors).

Unit: "all employees in the Municipality of Perth, Ontario, save and except Unit Managers, persons above the rank of Unit Manager, Office, Sales and Engineering Staff, and students employed during the school vacation period, clerical staff and persons regularly employed for not more than 24 hours per week." (*Granted*).

Number of names of persons on list as originally prepared by employer		79
Number of persons who cast ballots	74	
Number of ballots marked in favour of respondent		30
Number of ballots marked against respondent		41
Ballots segregated and not counted		3

0488-82-R: Rapid Ready-Mix Limited, (Applicant) v. International Union of Operating Engineers, Local 793, (Respondent). (*Dismissed*).

0582-82-R: Angelina Papa, (Applicant) v. International Leather Goods, Plastics and Novelty Workers Union Local 8, (Respondent) v. Paragon Leather Goods Limited, (Intervener).

Unit: "all employees at the employer's plant in the Municipality of Metropolitan Toronto, save and except designers, forepersons and persons above the rank of foreperson, office staff, sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (*Granted*).

Number of Names of persons on list as originally prepared by employer	14
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Number of persons who cast ballots	11	
Number of ballots marked in favour of respondent		2
Number of ballots marked against respondent		9

0595-82-R: Cathy Bernatt, (Applicant) v. Hotel, Restaurant & Cafeteria Employees Union – Local 75, (Respondent) v. Filkon Food Services Limited, c.o.b. as By the Way Frozen Yogurt, (Intervener).

Unit #1: “all employees of the respondent at By the Way Frozen Yogurt in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period.” (*Granted*).

Number of names of persons on list as originally prepared		18
Number of persons who cast ballots	14	
Number of spoiled ballots		1
Number of ballots marked in favour of respondent		2
Number of ballots marked against respondent		11

Unit #2: “All employees of the respondent at By the Way Frozen Yogurt in the Municipality of Metropolitan Toronto regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, office and sales staff.” (*Granted*).

Number of names of persons on list as originally prepared		1
Number of persons who cast ballots	1	
Number of ballots marked in favour of respondent		0
Number of ballots marked against respondent		1

0602-82-R: Kenneth Green, (Applicant) v. Teamsters Union Local 141 London Ontario, (Respondent). (*Withdrawn*).

0641-82-R: John D. Weed, (Applicant) v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America (Local 419), (Respondent) v. Browning-Ferris Industries Ltd., (Intervener). (*Dismissed*).

0799-82-R: Dennis McClure, (Applicant) International Association of Machinists and Aerospace Workers District Lodge 717, (Respondent) v. Canada Valve Limited, (Intervener).

Unit: “all its employees in the “manufacturing division” of Canada Valve Limited employed at 180 Market Drive, Milton, Ontario, save and except assistant foreman, persons above the rank of assistant foreman, office and clerical employees, sales staff and students employed during the school vacation period.” (*Granted*).

Number of names of persons on list as originally prepared by employer		39
Number persons who cast ballots	35	
Number of spoiled ballots		1
Number of ballots marked in favour of applicant		11
Number of ballots marked against respondent		23

0803-82-R: John Heeney, (Applicant) v. Labourers’ International Union of North America, Local 183, (Respondent) v. Apex Services, Division of 226023 Holdings Ltd., (Intervener). (*Dismissed*).

0818-82-R: Ivor R. Smith, (Applicant) v. Retail, Wholesale Dairy & General Workers' Union, AFL, CIO, CLC, Local 440, (Respondent) v. Smith-Corona, Division of SCM (Canada) Limited, (Intervener).

Unit: "all service parts and warehouse employees employed at 29 Gervais Drive, Don Mills, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, persons regularly employed for not more than twenty-four (24) hours per week and students employed during the school vacation period." (*Granted*).

Number of names of persons on list as originally prepared by employer		11
Number of persons who cast ballots	9	
Number of ballots marked in favour of respondent		2
Number of ballots marked against respondent		7

0838-82-R: Bryce Teed, (Applicant) v. International Molders and Allied Workers Union, Local 28, (Respondent). (*Dismissed*).

0951-82-R: H. J. McFarland Memorial Home, (Applicant) v. Ontario Nurses Association, (Respondent). (*Withdrawn*).

1012-82-R: The Laboratory Staff of Sunny Orange A Division of McCain Foods Limited, (Applicant) v. United Food and Commercial Workers International Union, affiliated to AFL, CIO, CLC, and its local 411-P-3P, (Respondent). (*Granted*).

REFERRAL AS TO APPOINTMENT OF CONCILIATION OFFICER

0001-82-M: London Sandblasting & Painting Limited, (Employer) v. International Brotherhood of Painters & Allied Trades and the Ontario Council of the International Brotherhood of Painters & Allied Trades, and International Brotherhood of Painters & Allied Trades, Local 1783, (Trade Unions) v. Painters & Employer Bargaining Agency, Ontario Painting Contractors Association and Labour Relations Bureau of Ontario General Contractors Association, (Intervener). (*Granted*).

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

1496-80-U: Tecumseh Insulation Service Ltd., and Christian Labour Association of Canada, (Applicants) v. Toronto Building and Construction Trades Council, International Brotherhood of Electrical Workers, Local 353, International Union of Operating Engineers, Hoisting Division, International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, International Association of Bridge, Structural and Ornamental Iron Workers, Local 721, Labourers International Union, Local 506, Carpenters District Council of Toronto and Vicinity affiliated with United Brotherhood of Carpenters and Joiners of America, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, Mike Lloyd, James D. Johnson, Loran J. O'Neill, Al Taggart, Vic Churley, Joe Duffy, John Donaldson, Uree Davidoff, Phil Robichaud, Murray Ritchie, Robert Rynyk, Tom Wilson, Allan Blomme, Antonio Figueiredo, Harvey L. Moulard, and Bernardino Fernandes, Alex Conti, Mario Bratolotto, and Victorio Machado, (Respondents) v. The Master Insulators' Association of Ontario, Incorporated, (Intervener). (*Granted*).

COMPLAINTS OF UNFAIR LABOUR PRACTICES

1501-80-U: Tecumseth Insulation Services Ltd., and Christian Labour Association of Canada, (Complainants) v. Toronto Building and Construction Trades Council, International Brotherhood of Electrical Workers, Local 353, International Union of Operating Engineers, Hoisting Division, International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, International Association of Bridge, Structural and Ornamental Iron Workers, Local 721, Labourers International Union, Local 506, Carpenters District Council of Toronto and Vicinity affiliated with United Brotherhood of Carpenters and Joiners of America, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46, Mike Lloyd, James D. Johnson, Loran J. O'Neill, Al Taggart, Vic Churley, Joe Duffy, John Donaldson, Uree Davidoff, Phil Robichaud, Murray Ritchie, Robert Rynyk, Tom Wilson, Allan Blomme, Antonio Figuereido, Harvey L. Mouland, and Bernardino Fernandes, Alex Conti, Mario Bratolotto, and Victorio Machado, (Respondents) v. The Master Insulators' Association of Ontario, Incorporated, (Intervener). (*Withdrawn*).

2385-81-U: International Molders and Allied Workers' Union (Complainant) v. Washington Mills Limited, (Respondent). (*Withdrawn*).

2393-81-U: Richard Boon, (Complainant) v. Local 247 of the Labourers' International Union of North America, (Respondent). (*Dismissed*).

2394-81-U: Manuel Costa, (Complainant) v. Local 247 of the Labourers' International Union of North America, (Respondent). (*Dismissed*).

2395-81-U: Ernesto Rebelo, (Complainant) v. Local 247 of the Labourers' International Union of North America, (Respondent). (*Dismissed*).

2396-81-U: Antonio Almeida, (Complainant) v. Local 247 of the Labourers' International Union of North America, (Respondent). (*Dismissed*).

2397-81-U: Jorge Menacho, (Complainant) v. Local 247 of the Labourers' International Union of North America, (Respondent). (*Dismissed*).

2398-81-U: Anibal Costa, (Complainant) v. Local 247 of the Labourers' International Union of North America, (Respondent). (*Dismissed*).

2399-81-U: Eduardo Bastos, (Complainant) v. Local 247 of the Labourers' International Union of North America, (Respondent). (*Dismissed*).

0086-82-U: Retail, Commercial & Industrial Union, Local 206, chartered by the United Food & Commercial Workers International Union, (Complainant) v. Preston Springs Gardens Retirement Home, (Respondent). (*Dismissed*).

0090-82-U: Michael Shaw, (Complainant) v. International Union of Elevator Constructors, Local 50 and William Morran, (Respondent). (*Granted*).

0287-82-U: United Brotherhood of Carpenters and Joiners of America, Local 1316, (Complainant) v. Can-Am Acoustics Limited, (Respondent). (*Granted*).

0320-82-U: Betty Ball and Wayne Warren, (Complainants) v. All-Way Transportation Services Limited, (Respondent). (*Dismissed*).

0325-82-U: Steinberg Inc. (Miracle Food Mart Division), Complainant) v. Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Respondent). (*Dismissed*).

0326-82-U: Steinberg Inc. (Miracle Food Mart Division), (Complainant) v. Teamsters Local Union No. 419, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Sean Floyd, (Respondent). (*Dismissed*).

0433-82-U: James Patrick Nugent, (Complainant) v. Bapistan Systems Limited, (Respondent) v. International Association of Bridge Structural and Ornamental Ironworkers Local 834, (Intervener). (*Dismissed*).

0464-82-U: M. G. Johre, (Complainant) v. I.B..W. Local 120, W.J. Arnexeder, (Respondents). (*Withdrawn*).

0553-82-U: United Steelworkers of America, (Complainant) v. Champion Parts Rebuilders, Canada Ltd., (Respondent). (*Withdrawn*).

0577-82-U: David Michael Sedran and Richard Patrick Girard, (Complainants) v. Sterling Automotive Supplies Inc., (Respondent). (*Dismissed*).

0770-82-U: International Union of Operating Engineers, Local 796, (Complainant) v. Cadillac Fairview Corporation Limited, (Respondent). (*Dismissed*).

0764-82-U: Rod Cohen, (Applicant) v. Allway-Wheeltrans Transportation Services Ltd., (Respondent). (*Dismissed*).

0817-82-U: Hotel, Restaurant & Cafeteria Employees Union, Local 75, (Complainant) v. The Carlton Place Hote, (Respondent). (*Withdrawn*).

0829-82-U: Alan Magder, (Complainant) v. Bernard O'Connor and Canadian Dressed Meats Limited, (Respondent). (*Dismissed*).

0830-82-U: Canadian Union of Operating Engineers & General Workers, Local 111, (Complainant) v. Queensway-Carleton Hospital, (Respondent). (*Withdrawn*).

0835-82-U: Sam Kombargi, (Complainant) v. Vince McNally - Local 75 Representative, (Respondent) v. Joseph DeBusschere, Banquet Manager, Hotel Plaza II' (Intervener). (*Dismissed*).

0890-82-U: United Steelworkers of America, (Complainant) v. Kelson Spring Products Limited, Kenneth Sernaker, (Respondents). (*Withdrawn*).

0892-82-U: Krishna Poduval, (Complainant) v. United Automobile Workers, Local 195, (Respondent). (*Withdrawn*).

0913-82-U: Bruno E. Kerber, (Complainant) v. Local 1967 UAW, (Respondent).

0915-82-U: Consolidated-Bathurst Packaging Limited, (Applicant) v. Canadian Paper Workers Union Local 595, Canadian Paperworkers Union Local 343, Canadian Paperworkers Union, Garry Buccella, Energy and Chemical Workers, Local 29; and Energy and Chemical Workers, Local 20, (Respondents). (*Granted*).

0922-82-U: Peter George, (Complainant) v. Babcock & Wilcox Ltd. United Steelworkers of America, Local 2859, (Respondent). (*Withdrawn*).

0929-82-U: Paul Tillaart, (Complainant) v. David Brown Construction, (Respondent). (*Withdrawn*).

0934-82-U: Tony Graziano, (Complainant) v. United Glass and Ceramic Workers of North America and its local 200, (Respondent). (*Withdrawn*).

935-82-U: Canadian Union of Public Employees and its Local 1813, (Complainant) v. South Muskoka District Association for the Mentally Retarded, (Respondent). (*Withdrawn*).

0937-82-U: Maria Vespier, (Complainant) v. Amalgamated Clothing and Textile Workers Union and Don Ivan Associates Ltd. (Daisy Decorative Products), (Respondent). (*Withdrawn*).

0939-82-U; 0940-82-U; 0941-82-U: Health, Office & Professional Employees, Division of Local 206, Retail Commercial & Industrial Union, Employees, Division of Local 206, Retail Commercial & Industrial Union, chartered by the United Food & Commercial Workers International Union, (Complainant) v. Sweetbriar Nursing Home Township of Sunnydale, Simcoe County, (Respondent). (*Withdrawn*).

0947-82-U: Retail Clerks Union, Local 409 Chartered by U.F.C.W. International Union, (Complainant) v. The Place Ltd., (Respondent). (*Withdrawn*).

0952-82-U: H. J. McFarland Memorial Home, (Complainant) v. Ontario Nurses Association, (Respondent). (*Withdrawn*).

0955 -82-U: United Steelworkers of America, (Complainant) v. Wheaton Glass Company, A Division of Wheaton Industries of Canada Limited, (Respondent). (*Withdrawn*).

0962-82-U: International Brotherhood of Electrical Workers, Local 1687, (Complainant) v. Comstock International Limited, (Respondent). (*Withdrawn*).

0970-82-U: Richard Bene, (Complainant) v. Joseph Bergeret: Head of International Brotherhood of Painters and Allied Trades, Local 1904, (Respondent). (*Withdrawn*).

0976-82-U: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees Local Union No. 647, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (Complainant) v. Baker McSweeney's, (Respondent). (*Withdrawn*).

0980-82-U: General Workers Union, Local 1030 of U.B.C. and J. of A., (Complainant) v. Rampart Enterprises Limited, (Respondent). (*Withdrawn*).

1028-82-U: Robert Dobbin and Wayne Bayer (Stewards), (Complainant) v. Stan Dwyer (I.U.O.E. Local 793), (Respondent). (*Withdrawn*).

1048-82-U: Joseph Nick Veitri, (Complainant) v. United Steelworkers of America, (Respondent). (*Withdrawn*).

1074-82-U: Hotels, Clubs, Restaurants, Taverns Employees Union Local 261, (Complainant) v. Modern Building Cleaning, a Division of Dustbane Enterprises Limited, (Respondent). (*Withdrawn*).

1108-82-U: William Nikita, (Complainant) v. Teamsters Local 880, (Respondent). (*Withdrawn*).

1153-82-U: Canadian Union of Public Employees and its' Local 2717, (Complainant) v. St. Joseph's Villa, (Respondent). (*Withdrawn*).

1191-82-U: Peter George, (Complainant) v. Babcock & Wilcox Ind. Ltd., United Steelworkers of America Local 2859, (Respondent). (*Withdrawn*).

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0968-82-M: Granny's Country-Oven Bakery Limited, (Employer) v. G.C.O. Employees Association, (Trade Union). (*Granted*).

JURISDICTIONAL DISPUTES

0330-81-JD: Toronto Central Ontario Building and Construction Trades Council and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46, (Complainants) v. Simcoe Mechanical Contracting Limited and Christian Labour Association of Canada, (Respondents) v. Mechanical Contractors Association of Toronto, (Intervener #1) v. Mechanical Contractors Association of Ontario, (Intervener #2). (*Granted*).

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

2476-81-M: Canadian Union of Public Employees, Local 1628, (Applicant) v. Peel Board of Education, (Respondent). (*Withdrawn*).

0199-82-M: St. Peter's Hospital, (Applicant) v. Ontario Nurses' Association, (*Withdrawn*).

0387-82-M: Canadian Union of Public Employees, Local 839, (Applicant) v. The Disabled and Aged Regional Transit System, (Respondent). (*Withdrawn*).

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

2391-81-OH: Dennis Wawia, (Complainant) v. Inco Metals Company, (Respondent). (*Dismissed*).

0963-82-OH: International Brotherhood of Electrical Workers, Local 1687, (Complainant) v. Comstock International Limited, (Respondent). (*Withdrawn*).

CONSTRUCTION INDUSTRY GRIEVANCES

1339-80-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666, 681, 1133, 1747, 1963, 1304, 3227 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Quality Craft Interiors Limited, (Respondent). (*Withdrawn*).

2378-80-M: United Brotherhood of Carpenters and Joiners of America, Local 2222, (Applicant) v. Cementation Canada Ltd., (Respondent). (*Withdrawn*).

2740-81-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666,681, 1133, 1304, 1747, 1963 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Wes. Emery Display, (Respondent). (*Withdrawn*)

006-82-M: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Tundra Insulation Inc., (Respondent). (*Withdrawn*)

0144-82-M: Toronto-Central Ontario Building and Construction Trades Council (formerly known as the Toronto Building and Construction Trades Council) on its own behalf and on behalf of its affiliates (see Appendix "a") (Applicant) v. M.J. Guthrie Construction Limited, (Respondent). (*Dismissed*).

0245-82-M: United Brotherhood of Carpenters and Joiners of America, Local 1316, (Applicant) v. Merit Drywall & Accoustics Limited and Wm. J. Broome Ltd., (Respondents). (*Withdrawn*).

0360-82-M: United Brotherhood of Carpenters and Joiners of America, Local 446, (Applicant) v. Custodis Chimney Company, (Respondent). (*Withdrawn*).

0411-82-M: International Association of Heat and Frost Insultors and Asbestos Workers, Local 95, (Applicant) v. Tundra Insulation Inc., (*Withdrawn*).

0482-82-M: International Brotherhood of Painters and Allied Trades, Local 1891, (Applicant) v. Mar-ot Painting Contractors Limited and Ionview Construction Limited, (Respondent). (*Granted*).

0517-82-M: International Association of Bridge, Structural and Ornamental Ironworkers Local 759, (Applicant) v. Weldland Steel Limited, (Respondent). (*Withdrawn*).

0524-82-M: Ontario Provincial District Council, (Applicant) v. Orazio D; Aliasi Masonry Contractors Countryside Masonry Ltd., (Respondent). (*Granted*).

0584-82-M: United Brotherhood of Carpenters and Joiners of America, Local 2041, (Applicant) v. Yes Paquet and 100878 Canada Ltee, (Respondent). (*Granted*).

0619-82-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27, 666,681, 1133, 1304, 1747, 1963 and 3233, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Chairman Mills, (Respondent). (*Withdrawn*).

0670-82-M: United Brotherhood of Carpenters and Joiners of America, Local 1190, (Applicant) v. Sera Construction Ltd., (Respondent). (*Withdrawn*).

0732-82-M: United Brotherhood of Carpenters and Joiners of America, Local 38, (Applicant) v. Glendell Limited, (Respondent) (*Withdrawn*).

0743-82-M: Sheet Metal Workers International Association, Local Union & Sons (London), Limited and Williamson Bros. Ltd., (Respondents). (*Granted*).

0750-82-M: International Brotherhood of Painters & Allied Trades Local 1824, (Applicant) v. Apollo Painting & Decorating Ltd., (Respondent). (*Granted*).

0760-82-M: United Brotherhood of Carpenters and Joiners of America, Local 1669, (Applicant) v. George Armstrong Co. Limited, (Respondent). (*Withdrawn*).

0811-82-M: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers, Local 128 (on behalf of Arthur Grant), (Applicant). v. Frankel Steel Limited, (Respondent). (*Withdrawn*).

0863-82-M: Labourers' International Union of North America, Local 183, (Applicant) v. G.M. Gest Inc., (Respondent). (*Dismissed*).

0881-82-M: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Ridgewood Insulation Ltd., (Respondent). (*Withdrawn*).

0884-82-M: International Association of Heat and Frost Insulators and Asbestos Workers Local 95, (Applicant) v. Standard Insulation Ltd., (Respondent). (*Withdrawn*).

0891-82-M: International Union of Operating Engineers, Local 793, (Applicant) v. Pe Ben Pipelines (1979) Ltd., (Respondent). (*Withdrawn*).

0965-82-M: Local Union 2486, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Ruggles Construction, Division of Ruggles Sales and Services Ltd., (Respondent). (*Granted*).

09677-82-M: United Brotherhood of Carpenters and Joiners of America Local 1988, (Applicant) v. W. Rourke Ltd., (Respondent). (*Withdrawn*).

0981-82-M: United Brotherhood of Carpenters and Joiners of America Local 2041, (Applicant) v. J. R. Noel Plastering Ltd., (Respondent). (*Withdrawn*).

0994-82-M: United Brotherhood of Carpenters and Joiners of America, (Applicant) v. K.A. Mace Ltd., (Respondent). (*Withdrawn*).

1004-82-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters' and Joiners of America, (Applicant) v. Climb Formwork, (Respondent). (*Withdrawn*).

1007-82-M: Teamsters Local 230 Ready Mix, Building Supply, Hydro and Construction Drivers Warehousemen and Helpers, (Applicant) v. Bot Construction (Canada) Limited, (Respondent). (*Withdrawn*).

1016-82-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters' and Joiners of America, (Applicant) v. Danar Development Co. Ltd., (Respondent). (*Withdrawn*).

1017-82-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters' and Joiners of America, (Applicant) v. Chair-Man Mills, (Respondent). (*Withdrawn*).

1018-82-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters' and Joiners of America, (Applicant) v. Appeal Contractors Ltd., (Respondent). (*Withdrawn*).

1019-82-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters' and Joiners of America, (Applicant) v. Apollo Interiors, (Respondent). (*Withdrawn*).

1020-82-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters and Joiners of America, (Applicant) v. Ranade Development Limited, (Respondent). (*Withdrawn*).

1027-82-M: United Brotherhood of Carpenters and Joiners of America, Local 204, (Applicant) v. Acc-Par Systems Limited, (Respondent). (*Granted*).

1039-82-M: United Brotherhood of Carpenters and Joiners of America, (Applicant) v. K.A. Mace Ltd., (Respondent). (*Withdrawn*).

1053-82-M: International Union of Operating Engineers, Local 793, (Applicant) v. Pe Ben Pipelines (1979) Ltd., (Respondent). (*Withdrawn*).

1056-82-R: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen, (Applicant) v. Ambassador Marble & Tile Limited, (Respondent). (*Withdrawn*).

1057-82-M: United Brotherhood of Carpenters and Joiners of America, Local 785, (Applicant) v. Trolan Interior Contracting Limited, (Respondent) (*Withdrawn*).

1063-82-M: Labourers' international Union of North America, Local 183, (Applicant) v. Ontario Concrete & Drain Contractors Association, (Respondent). (*Withdrawn*).

1064-82-M: Interantional Association of Heat and Frost Insulators and Asbestos Workers, Local 95, (Applicant) v. Ridgewood Insulation Limited, (Respondent). (*Withdrawn*).

1087-82-M: Carpenters' District Council of Toronto and Vicinity on behalf of Locals 27 and 1304, United Brotherhood of Carpenters' and Joiners of America, (Applicant) v. Chairman Mills Ltd., (Respondent). (*Granted*).

1094-82-M: United Brotherhood of Carpetners and Joiners of America, Local 2041, (Applicant) v. Richard Lessard Construction Limited, (Respondent). (*Withdrawn*).

1110-82-M: Labourers' international Union of North America, Local 625, (Applicant) v. George Wimpey Canada Limited, (Respondent). (*Withdrawn*).

1111-82-M: Labourers' International Union of North America, Local 625, (Applicant) v. George Wimpey Canada Limited, (Respondent). (*Withdrawn*).

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

0145-81-U: Clarence Kitchen, (Complainant) v. Retail, Wholesale, Bery & Confectionary Workers Union, Local 461, (Respondent). (*Dismissed*).

0780-82-U: Mechanical Contractors Association of Ontario, (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 463, All-Pro Contractors, Chris Burrows, Peter Christy, Regional Mechanical Services, and 375253 Ontario Limited, (Respondents). (*Dismissed*).

RIGHT TO ACCESS

0791-82-M: Canadian Paperworkers' Union, (Applicant) v. Abitibi-Price Inc., (Respondent). (*Granted*).

1083-82-M: Canadian Paperworkers Union, (Applicant) v. Domtar Inc., Domtar Forest Products, Woodlands Division, (Respondent). (*Granted*).

APPLICATIONS FOR ACCREDITATION

2521-81-R: Residential Sheet Metal Contractors Organization, (Application) v. Sheet Metal Workers International Association, Local Union #285, (Respondent). (*Granted*).

*Ontario Labour Relations Board,
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